

Exhibit 2

1 UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF MICHIGAN
3 SOUTHERN DIVISION

4 KEVIN T. LAVERY, M.D.,

Case No:

2:22-cv-10613-BAF-KGA

5 Plaintiff,

6 vs.

7 PURSUANT HEALTH, INC.,

8 Defendant.

9
10 VIDEO-RECORDED DEPOSITION OF BART FOSTER
11 January 13, 2023
12

13
14 PURSUANT TO WRITTEN SUBPOENA and the
15 appropriate rules of civil procedure, the
16 video-recorded deposition of Bart Foster, called for
17 examination by the Defendant, was taken at Hotel
18 Boulderado, 2115 13th Street, Boulder, Colorado,
19 commencing at 10:48 a.m. on January 13, 2023, before
20 Jennifer Bajwa Melius, Verbatim Stenographic Reporter
21 and Registered Professional Reporter.
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23
24
25

<p style="text-align: right;">Page 2</p> <p>1 APPEARANCES</p> <p>2 ON BEHALF OF THE PLAINTIFF:</p> <p>3 BRUCE A. INOSENIO, JR., ESQ. (via Zoom)</p> <p>4 Inosencio Fisk</p> <p>5 740 West Michigan Avenue</p> <p>6 Jackson, Michigan 49201</p> <p>7 (517)796-1444</p> <p>8 bruce@inosencio.com</p> <p>9</p> <p>10 ON BEHALF OF THE DEFENDANT:</p> <p>11 JOEL D. BUSH II, ESQ.</p> <p>12 Kilpatrick Stockton LLP</p> <p>13 1100 Peachtree Street NE, Suite 2800</p> <p>14 Atlanta, Georgia 30309</p> <p>15 (404)815-6500</p> <p>16 jrbush@kilpatricktownsend.com</p> <p>17</p> <p>18 ALSO PRESENT:</p> <p>19 Quentin Malveaux, Jr. Videographer</p> <p>20 John Jesser</p> <p>21 Peter Krivkovich (via Zoom)</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 4</p> <p>1 Exhibit 13 CIBA Vision EyeSite Kiosk Project: 48</p> <p>2 Phase 1 Morphology & Functional</p> <p>3 Breakdown</p> <p>4 (Strictly Confidential)</p> <p>5</p> <p>6 Exhibit 14 Protocol Document dated October 18, 51</p> <p>7 2006</p> <p>8 (Confidential)</p> <p>9</p> <p>10 Exhibit 15 Report Document dated February 22, 52</p> <p>11 2007</p> <p>12 (Confidential)</p> <p>13</p> <p>14 Exhibit 16 Implementation Planning of 53</p> <p>15 Initiatives</p> <p>16</p> <p>17 Exhibit 17 Kiosk Information Systems Quote 54</p> <p>18 dated October 27, 2006</p> <p>19</p> <p>20 Exhibit 18 Automated Eye Health Kiosk 63</p> <p>21 Presentation dated November 2006</p> <p>22 (Confidential - Do Not Distribute)</p> <p>23</p> <p>24 Exhibit 19 Request for Proposal: EyeSite 69</p> <p>25 Kiosk Prototype Project</p> <p>(CONFIDENTIAL)</p> <p>Exhibit 20 CIBA Vision Self-Service Vision 72</p> <p>Screen Kiosk, Phase 1: Marketing</p> <p>Plan Development for Market</p> <p>Verification</p> <p>Exhibit 21 Strategic Milestones 74</p> <p>Exhibit 22 Letter of Intent Draft dated 76</p> <p>6-05-07</p> <p>Exhibit 23 Business Recommendation dated July 81</p> <p>2006</p> <p>Exhibit 24 SoloHealth Development Plan IP 87</p> <p>Strategy dated August 15, 2007</p> <p>Exhibit 25 CIBA Vision Proof of Concept Kiosk 88</p> <p>Designs by Eyemaginations dated</p> <p>August 27, 2007</p> <p>Exhibit 26 Contribution Agreement 90</p> <p>(BALT1\4362547.8)</p>
<p style="text-align: right;">Page 3</p> <p>1 INDEX</p> <p>2 EXAMINATION: PAGE</p> <p>3 By Mr. Bush 8, 159</p> <p>4 By Mr. Inosencio 129</p> <p>5</p> <p style="text-align: center;">INITIAL</p> <p>6 EXHIBITS: REFERENCE</p> <p>7 Exhibit 1 United States District Court 10</p> <p>8 Subpoena to Testify at a Deposition</p> <p>9 in a Civil Action</p> <p>10 Exhibit 2 LinkedIn Profile of Bart Foster 10</p> <p>11 Exhibit 3 United States Patent Number 13</p> <p>12 US 7,614,747 B2</p> <p>13</p> <p>14 Exhibit 4 Letter from Moon to Foster dated 20</p> <p>15 January 23, 2006</p> <p>16 Exhibit 5 Letter from Foster to Moon dated 22</p> <p>17 February 24, 2006</p> <p>18</p> <p>19 Exhibit 6 Confidential Business Plan 25</p> <p>20</p> <p>21 Exhibit 7 Services and Collaboration 29</p> <p>22 Agreement dated April 5, 2006</p> <p>23 Exhibit 8 Snellen Chart 32</p> <p>24 Exhibit 9 EyeSite Project Log 33</p> <p>25 (EYESITE PROJECT: PRIVATE AND</p> <p>CONFIDENTIAL)</p> <p>Exhibit 10 Color Photographs 38</p> <p>Exhibit 11 Interoffice Memorandum from Foster 40</p> <p>to Kehoe dated July 28, 2006,</p> <p>Subject: EyeSite: Next Steps</p> <p>(Confidential)</p> <p>Exhibit 12 Interoffice Memorandum from Foster 45</p> <p>to Meece dated August 23, 2006,</p> <p>Subject: EyeSite: Next Steps</p> <p>(Confidential)</p>	<p style="text-align: right;">Page 5</p> <p>1 Exhibit 27 Complaint 92</p> <p>2 Exhibit 28 Assignment of Patent 95</p> <p>3 Exhibit 29 Consulting Agreement 96</p> <p>4 Exhibit 30 EyeSite Design Concepts dated 104</p> <p>5 October 18, 2007</p> <p>6</p> <p>7 Exhibit 31 EyeSite Design and Development 106</p> <p>8 Kickoff Meeting Agenda,</p> <p>9 October 29-30, 2007</p> <p>10</p> <p>11 Exhibit 32 SoloHealth Advisory Board 107</p> <p>12 Presentation dated February 1, 2008</p> <p>13 (CONFIDENTIAL)</p> <p>14</p> <p>15 Exhibit 33 Handwritten note dated April 14, 110</p> <p>16 2008</p> <p>17 Exhibit 34 Forbes Article: SoloHealth Wins 114</p> <p>18 Three Awards, Including 'Best in</p> <p>19 Show' for EyeSite Innovation at</p> <p>20 KioskCom Expo and Digital Signage</p> <p>21 Show in Las Vegas</p> <p>22 Exhibit 35 CNBC Article: First EyeSite Kiosk 115</p> <p>23 Debuts at Georgia Wal-Mart</p> <p>24</p> <p>25 Exhibit 36 Software Architecture Meeting 117</p> <p>Presentation dated September 2,</p> <p>2008</p> <p>Exhibit 37 SoloHealth Intellectual Property 118</p> <p>Exhibit 38 Patent Update by Stephen Kendig 119</p> <p>dated October 23, 2008</p> <p>Exhibit 39 United States Patent Number 120</p> <p>US 8,182,091 B2</p> <p>Exhibit 40 Stephen Kendig, VP of Operations 121</p> <p>and Development, SoloHealth,</p> <p>Project Development and Management</p> <p>Association Presentation, dated</p> <p>April 23, 2009</p>

<div style="text-align: right;">Page 6</div> <div>1 Exhibit 41 Email 148 2 Date: July 6, 2007 3 Subject: Revised LOI from July 6th 4 Exhibit 42 Email Chain and Attachments 149 5 Date: August 15, 2007, to 6 August 19, 2007 7 Subject: Revised Contribution 8 Agreement 9 Exhibit 43 Email Chain 151 10 Date: October 6, 2007, to 11 October 8, 2007 12 Subject: Revised Agreements 13 14 Exhibit 44 Contribution Agreement 155 15 (BALTI\4362547.7) 16 17 18 19 20 21 22 23 24 25</div>	<div style="text-align: right;">Page 8</div> <div>1 appearance. Counsel and all present, including 2 remotely, will now state their appearances and 3 affiliations for the record, beginning with the 4 noticing attorney. 5 MR. BUSH: Yes. I'm the noticing 6 attorney, Joel Bush, counsel for Pursuant Health with 7 Kilpatrick Townsend. 8 MR. INOSENSIO: Bruce Inosencio on 9 behalf of the plaintiff, Kevin Lavery. 10 BART FOSTER, 11 having been first duly sworn/affirmed, was examined 12 and testified as follows: 13 EXAMINATION 14 BY MR. BUSH: 15 Q. Good morning, Mr. Foster. Can you state 16 your full name for the record? 17 A. Bart Benjamin Foster. 18 Q. And can you state your address for the 19 record? 20 A. 3169 8th Street, Boulder, Colorado 21 80304. 22 Q. And have you ever been deposed before? 23 A. No. 24 Q. Before we get started, I want to briefly 25 touch on some ground rules for this process. We have</div>
<div style="text-align: right;">Page 7</div> <div>1 PROCEEDINGS 2 THE VIDEOGRAPHER: Good morning. We are 3 going on the record at 10:48 a.m. on January 13, 2023. 4 Please note that the microphones are sensitive and may 5 pick up whispering and private conversations. Please 6 mute your phones at this time. Audio and video 7 recording will continue to take place unless all 8 parties agree to go off the record. 9 This is the beginning of Media Unit 1 in 10 the video-recorded deposition of Bart Foster taken by 11 the counsel for defendant in the matter of Kevin T. 12 Lavery, M.D. versus Pursuant Health, Inc., filed in 13 the United States District Court for the Eastern 14 District of Michigan, Southern Division, Case 15 Number 2:22-cv-10613-BAF-KGA. 16 The location of this deposition is 2115 17 13th Street, Boulder, Colorado 80302. My name is 18 Quentin Malveaux representing Veritext, and I am the 19 videographer. The court reporter is Jennifer Melius 20 from Veritext. 21 I am not authorized to give the or 22 administer the oath. I am not related to any party in 23 this action, nor am I financially interested in the 24 outcome. If there are any objections to the 25 proceeding, please state them at the time of your</div>	<div style="text-align: right;">Page 9</div> <div>1 a stenographer who is going to take down my questions 2 and your answers, so it's real important that we 3 answer orally and give a -- give a yes or a no or a 4 stated response rather than an uh-huh or an huh-uh. 5 And I'm guilty of violating that from time to time, 6 and I may correct myself and I may also correct you if 7 you don't mind. 8 If I ask you a question, I'm going to 9 assume that you understood it if you answer it. But 10 if you don't understand my question, tell me that you 11 don't understand it, and I'll repeat it. 12 Is that fair? 13 A. Yes. 14 Q. This is not a process where we have a 15 normal conversation. We can't speak over one another. 16 I'm guilty of that, and I'm going to try to correct 17 myself and speak slowly. 18 If we interrupt one another and speak 19 over one another, not only do we have a very bad 20 transcript, but we have a very stressed out court 21 reporter, and I don't want to cause that. So I'm 22 going to not interrupt you. I'm going to try very 23 hard not to interrupt you, and we'll invite you to 24 wait until I finish asking my question before you 25 respond; is that fair?</div>

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<p>1 A. Yes.</p> <p>2 Q. I want to start by marking as Exhibit 1</p> <p>3 the subpoena in this matter.</p> <p>4 (Exhibit Number 1 was marked.)</p> <p>5 Q. (By Mr. Bush) Do you recognize the</p> <p>6 document we've marked as Exhibit 1?</p> <p>7 A. Yes.</p> <p>8 Q. And you're here today pursuant to this</p> <p>9 subpoena, correct?</p> <p>10 A. Correct.</p> <p>11 Q. Moving to Exhibit 2, I'm going to hand</p> <p>12 you Exhibit 2 and invite you to identify it for the</p> <p>13 record.</p> <p>14 (Exhibit Number 2 was marked.)</p> <p>15 Q. (By Mr. Bush) Do you recognize</p> <p>16 Exhibit 2 as your LinkedIn profile, Mr. Foster?</p> <p>17 A. Yes.</p> <p>18 Q. Can you walk us briefly through your</p> <p>19 educational background, beginning with the year you</p> <p>20 graduated from high school and then your matriculation</p> <p>21 in college?</p> <p>22 A. High school, graduated in 1993 from</p> <p>23 Satellite High School in Satellite, Florida. I went</p> <p>24 to the University of Florida where I graduated in 1997</p> <p>25 and got an online MBA through the University of</p>	<p>1 A. Correct.</p> <p>2 Q. And what was your position at Kellogg's?</p> <p>3 A. It was in sales on the food service side</p> <p>4 of the business.</p> <p>5 Q. And what was your position at Peachtree</p> <p>6 Network?</p> <p>7 A. Also in sales.</p> <p>8 Q. And what year did you begin employment</p> <p>9 at CIBA Vision? Do you remember?</p> <p>10 A. Exhibit 2 would show that. 2001.</p> <p>11 Q. And can you describe the different roles</p> <p>12 that you held at CIBA Vision from 2001 until the time</p> <p>13 that you founded SoloHealth in 2007?</p> <p>14 A. I started as promotions manager in the</p> <p>15 lens care division. The international assignment in</p> <p>16 the UK beginning in 2002. Returned to the U.S. in</p> <p>17 2004 as national account director over the distributor</p> <p>18 channel. Yeah.</p> <p>19 Q. And what was your position at CIBA</p> <p>20 Vision at the time you separated to become the founder</p> <p>21 of SoloHealth?</p> <p>22 A. National account director of the</p> <p>23 distributor channel.</p> <p>24 Q. Let's turn to what I will have the court</p> <p>25 reporter mark as Exhibit 3.</p>
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<p>1 Phoenix. I'm not sure the graduation date. Probably</p> <p>2 2000 -- I'm not sure.</p> <p>3 Q. And what was your degree that you</p> <p>4 obtained from the University of Florida in 1997?</p> <p>5 A. A bachelor of science in --</p> <p>6 THE STENOGRAPHER: A bachelor of science</p> <p>7 what?</p> <p>8 A. In marketing, BSBA.</p> <p>9 Q. (By Mr. Bush) And then you subsequently</p> <p>10 obtained an MBA. You just don't remember what year</p> <p>11 you received that degree?</p> <p>12 A. Correct.</p> <p>13 Q. And can you walk us through your</p> <p>14 employment history following your graduation from the</p> <p>15 University of Florida?</p> <p>16 A. I worked for Kellogg's until 2000 --</p> <p>17 roughly 2002. Peachtree Network, I think the dates --</p> <p>18 nope. I'll just give you the -- so it was Kellogg's,</p> <p>19 Peachtree Network, CIBA Vision. I founded SoloHealth</p> <p>20 October 1 of 2007 -- or left the company at that point</p> <p>21 and was no longer with CIBA Vision.</p> <p>22 Q. You left CIBA Vision October 1 of 2007;</p> <p>23 is that correct?</p> <p>24 A. Uh-huh.</p> <p>25 Q. And founded SoloHealth?</p>	<p>1 (Exhibit Number 3 was marked.)</p> <p>2 Q. (By Mr. Bush) Mr. Foster, do you</p> <p>3 recognize the document we marked as Exhibit 3?</p> <p>4 A. I do.</p> <p>5 Q. Can you identify it for the record?</p> <p>6 A. It's the U.S. patent dated November 10,</p> <p>7 2009, with a file date of November 10, 2004.</p> <p>8 Q. And who is the named inventor on this</p> <p>9 patent?</p> <p>10 A. Myself, Bart Foster.</p> <p>11 Q. Can you describe how you came to</p> <p>12 conceive of the concepts that are embodied in the</p> <p>13 patent that we've marked as Exhibit 3?</p> <p>14 A. Can you be more specific?</p> <p>15 Q. Yeah. You had an idea that resulted in</p> <p>16 this patent filing, right?</p> <p>17 Is that correct?</p> <p>18 A. Yes.</p> <p>19 Q. And that -- I just want to invite you to</p> <p>20 describe a little more for our record about that idea</p> <p>21 that you had that led to the filing of patent that's</p> <p>22 embodied in Exhibit 3?</p> <p>23 A. Now, I just want to be efficient with</p> <p>24 our time. Are you talking about the technical</p> <p>25 aspects? The date that the idea was conceived? Do</p>

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<p>1 you want to know who else I talked to that was</p> <p>2 involved in this? I need -- I would love specifics so</p> <p>3 we're not here --</p> <p>4 Q. Sure.</p> <p>5 A. -- for five hours.</p> <p>6 Q. I really am interested in hearing all of</p> <p>7 that. But I guess what I would really like to start</p> <p>8 with is what's the earliest time that you can identify</p> <p>9 that you --</p> <p>10 A. February 1 of 2004.</p> <p>11 Q. And what happened on February 1, 2004?</p> <p>12 A. There was a meeting in Birmingham,</p> <p>13 England, and I was -- we were brainstorming on ways to</p> <p>14 drive traffic from Asda, which is Walmart, into the</p> <p>15 vision center. And I raised my hand in the back of</p> <p>16 the room and said that the idea is -- what if we had a</p> <p>17 kiosk that would screen your vision and would tell you</p> <p>18 if you're 20/20 or not.</p> <p>19 And they wrote the idea down on a board,</p> <p>20 and they thanked me for the idea and said, "That's</p> <p>21 really cool."</p> <p>22 And I said, "No, no," like, "that's the</p> <p>23 idea." And that -- that put me on a journey to create</p> <p>24 this patent.</p> <p>25 Q. And the idea that you had at that</p>	<p>1 Walmart drive traffic because we knew that if that</p> <p>2 happened, everyone wins. And because we're the leader</p> <p>3 in contact lenses, we stand to gain the most.</p> <p>4 Q. And your idea was to help Walmart drive</p> <p>5 traffic by providing a kiosk for vision acuity?</p> <p>6 A. Correct.</p> <p>7 Q. Can you say a little more about your</p> <p>8 idea as it became embodied in this patent we marked as</p> <p>9 Exhibit 3 around a kiosk for vision acuity?</p> <p>10 What in your mind did that entail at</p> <p>11 this point in time?</p> <p>12 A. I think originally it was to actually</p> <p>13 allow someone to assess their vision without</p> <p>14 assistance. And I remember very distinctly that when</p> <p>15 I was in high school and I couldn't see the</p> <p>16 blackboard -- and I think it was ninth grade -- and my</p> <p>17 friend next to me said, "Why don't you try my</p> <p>18 glasses?" And I tried them on, and I had this ah-ha</p> <p>19 and I was like, "Holy shit, I need glasses."</p> <p>20 And I thought back to that moment and</p> <p>21 said, "I wonder how many years before that I could</p> <p>22 have benefitted from vision correction." And so the</p> <p>23 idea would be that you would be able to assess whether</p> <p>24 you need vision correction or not without having to go</p> <p>25 to an eye doctor.</p>
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<p>1 meeting on February 1 of 2004 was for a kiosk that</p> <p>2 would screen the vision of a person, correct?</p> <p>3 A. Correct.</p> <p>4 Q. Who was in this meeting in Birmingham,</p> <p>5 England, on February 1 of 2004?</p> <p>6 A. I can't recall.</p> <p>7 Q. Were -- was it a group of individuals --</p> <p>8 A. Yeah.</p> <p>9 Q. -- employed by CIBA Vision?</p> <p>10 A. Correct.</p> <p>11 Q. And the brainstorming objective of the</p> <p>12 meeting, can you describe a little more about that?</p> <p>13 You said that there was an effort to</p> <p>14 talk about driving traffic from Walmart into a vision</p> <p>15 center? Can you talk more about that?</p> <p>16 A. So Walmart said that you're the leader</p> <p>17 in contact lenses, which we were at the time. And</p> <p>18 they said, "Rising tide is going to float all boats,"</p> <p>19 and they wanted a way to -- for some of their big</p> <p>20 vendors, including us, to help them with one of their</p> <p>21 challenges.</p> <p>22 And the challenges for them were</p> <p>23 awareness because very few people that shopped the</p> <p>24 Walmart stores even know they have a vision center.</p> <p>25 So the idea was to brainstorm ways that we could help</p>	<p>1 Q. And at this point in time, can you</p> <p>2 describe your concept of the technical features of the</p> <p>3 kiosk, how the kiosk would go about providing a vision</p> <p>4 screening functionality for an individual?</p> <p>5 A. When you say "at this time," do you mean</p> <p>6 that day in 2004?</p> <p>7 Q. I'm -- 2004, the -- either on that day</p> <p>8 or up until the time that the patent filing occurred</p> <p>9 on November 10 of 2004.</p> <p>10 A. I don't think I had a conception of</p> <p>11 that -- the technical aspect of actually how it was</p> <p>12 going to work.</p> <p>13 Q. And did you start collaborating with</p> <p>14 other individuals around the technical aspects for a</p> <p>15 vision acuity kiosk in?</p> <p>16 A. I --</p> <p>17 Q. -- 2004?</p> <p>18 A. I did.</p> <p>19 Q. And with whom did you begin</p> <p>20 collaborating?</p> <p>21 A. It was Dr. David Thomson at the City</p> <p>22 University in London.</p> <p>23 Q. And how did you meet Dr. David Thomson</p> <p>24 at the City University in London?</p> <p>25 A. Do you mean who introduced us, or what</p>

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1 was the first meeting or what was the question?
2 Sorry.
3 Q. How did you meet him? How did you first
4 meet Dr. David Thomson?
5 A. I met him in person at his office in --
6 at the City University of London.
7 Q. And that was in 2004?
8 A. Correct.
9 Q. And how did you -- how did the
10 introduction to Mr. -- Dr. Thomson come about?
11 A. I found him -- I found some of the work
12 that he did online, and I called him.
13 Q. And when you decided to reach out to
14 Dr. Thomson in 2004, what was your reason for doing
15 so?
16 A. To understand more about how we would
17 accomplish a vision screening kiosk, because he had
18 vision screening software. He just didn't have it
19 automated in a kiosk. So I essentially wanted to see
20 is it possible to incorporate.
21 Q. And so after that first meeting with
22 Dr. Thomson, that led to subsequent collaboration
23 between you and Dr. Thomson around integrating his
24 software into a kiosk?
25 A. That's correct.

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1 Q. Other than Dr. David Thomson, was there
2 anyone else involved in 2004 in your executing on this
3 idea for a vision acuity kiosk?
4 A. There were people I talked to, but not
5 about the technical aspects until -- other than
6 Dr. David Thomson, until I got back to the U.S. Yeah.
7 Q. And you returned to the U.S. in late
8 2004; is that right?
9 A. Correct.
10 Q. You were in England --
11 A. Correct.
12 Q. -- for roughly two years with CIBA
13 Vision?
14 A. Correct.
15 Q. And I know that your patent in
16 identifying you as a named inventor, the location on
17 the patent is Winchester, Great Britain, correct?
18 A. Correct.
19 Q. And that's because this idea came to you
20 while you were in the United Kingdom while working for
21 CIBA Vision, correct?
22 A. Correct.
23 Q. And was it your idea that the vision
24 acuity kiosk would provide test results to the
25 individual engaged in the vision screening through the

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1 kiosk?
2 A. Yes. That's correct.
3 Q. And what was your idea about what those
4 test results would report?
5 A. Your prescription, whether you were
6 minus 2 or a minus 4. Yeah.
7 Q. And when you say "prescription," you're
8 talking about corrective lens prescription?
9 A. That's correct.
10 Q. In other words, to remedy whether a
11 person was nearsighted or farsighted or --
12 A. Yeah.
13 Q. -- any other sort of corrective lens
14 necessary to --
15 A. That's correct.
16 Q. -- to improve vision?
17 A. Yes.
18 Q. I'm going to handed you a document that
19 we will mark as Exhibit 4.
20 (Exhibit Number 4 was marked.)
21 Q. (By Mr. Bush) Mr. Foster, do you
22 recognize the document we've marked as Exhibit 4?
23 A. I do.
24 Q. Can you identify it for the record?
25 A. It's a document dated January 23, 2006,

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1 from Panaseca, a guy named Jory Moon.
2 Q. And what is your memory about the
3 circumstances of your receipt of this letter from
4 Panaseca in January of 2006?
5 A. Repeat that first part of the question.
6 Q. What's your memory about the
7 circumstances around --
8 A. They, I believe, had something similar
9 that they wanted to partner with us on.
10 Q. And when you say "something similar,"
11 you mean that Panaseca had some other iteration of a
12 vision screening --
13 A. Correct.
14 Q. -- functionality?
15 A. That's correct.
16 Q. Panaseca writes at the bottom of this
17 first page under pilot location that their research
18 and experience shows that the level of retail volume
19 traffic is a good predictor of the number of users who
20 will interact with the vision center.
21 Do you see that?
22 A. Uh-huh.
23 Q. Had you previously reached that same
24 conclusion, or was this new information to you?
25 A. I reached the same -- I mean, that's

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<p>1 obvious.</p> <p>2 Q. In other words, when you first</p> <p>3 articulated your idea in 2004 for driving traffic to</p> <p>4 the Walmart Vision Center, it was your belief that</p> <p>5 placing a vision screening kiosk in the -- in the</p> <p>6 Walmart would help drive traffic?</p> <p>7 A. Correct.</p> <p>8 Q. I'm going to hand you a document we'll</p> <p>9 mark as Exhibit 5.</p> <p>10 (Exhibit Number 5 was marked.)</p> <p>11 Q. (By Mr. Bush) Mr. Foster, do you</p> <p>12 recognize the document we've marked as Exhibit 5?</p> <p>13 A. I do.</p> <p>14 Q. Can you identify Exhibit 5 for our</p> <p>15 record?</p> <p>16 A. It's a document dated February 24, 2006,</p> <p>17 from Jory Moon to Bart Foster -- sorry. It's to Jory</p> <p>18 Moon from Bart Foster with a copy to Scott Meece,</p> <p>19 general counsel.</p> <p>20 Q. Is it fair to say that Exhibit 5 is a</p> <p>21 letter that you drafted to Panaseca in response to the</p> <p>22 letter that we marked as Exhibit 4?</p> <p>23 A. I don't know if it was in response to.</p> <p>24 Q. Is it fair to say that Exhibit 5 is a</p> <p>25 letter that you drafted to Panaseca?</p>	<p>1 we intended to do. Over the coming years, we were</p> <p>2 able to broaden that with a series of claims through</p> <p>3 some meetings that we had internally.</p> <p>4 And there was one specific meeting I</p> <p>5 remember, just a brainstorming meeting, where we</p> <p>6 uncovered, you know, a lot of things that we would put</p> <p>7 into that.</p> <p>8 Q. What else do you remember about that</p> <p>9 brainstorming meeting that you described in which you</p> <p>10 uncovered additional potential claims for the patent?</p> <p>11 A. All the -- just how to broaden it and</p> <p>12 how to -- all the different things it could test for.</p> <p>13 Q. And what were the different things that</p> <p>14 the kiosk could test for that were under consideration</p> <p>15 at this point in time?</p> <p>16 A. Can I look at the document myself? I</p> <p>17 can tell you.</p> <p>18 Q. Sure. We'll just make it an exhibit, if</p> <p>19 that's okay.</p> <p>20 A. We can.</p> <p>21 Q. Let's -- we'll need a copy of that for</p> <p>22 our record. Can we keep that and make a copy and --</p> <p>23 A. Sure. If I get a copy back.</p> <p>24 Q. We'll make sure you get a copy back.</p> <p>25 THE DEPONENT: Tom [sic], this is the</p>
Page 23	Page 25
<p>1 A. With Scott Meece's guidance, correct.</p> <p>2 Q. And who is Scott Meece?</p> <p>3 A. General counsel, CIBA Vision.</p> <p>4 Q. And you write in this letter to Panaseca</p> <p>5 on February 24 of 2006 you write, "As you know, CIBA</p> <p>6 Vision has been working on its own vision screening</p> <p>7 device over the past two years."</p> <p>8 Do you see that?</p> <p>9 A. Correct.</p> <p>10 Q. Can you describe generally what CIBA</p> <p>11 Vision had been doing with its own vision screening</p> <p>12 device idea over the two years prior to this letter?</p> <p>13 A. Yes. We had several meetings to discuss</p> <p>14 the -- what would be in the patent. We wanted to be</p> <p>15 as broad as possible, yet cover what we were planning</p> <p>16 to do.</p> <p>17 Q. And the patent filing was in November of</p> <p>18 2004, correct?</p> <p>19 A. Correct.</p> <p>20 Q. And what efforts was CIBA vision engaged</p> <p>21 in with respect to the vision screening kiosk after</p> <p>22 November of 2004 and up until the date of this letter</p> <p>23 in February of 2006, if you remember?</p> <p>24 A. So the 2004 date was the provisional</p> <p>25 patent, and it was very broad in that it covered what</p>	<p>1 business plan from 2004.</p> <p>2 MR. BUSH: And we'll mark that as</p> <p>3 Exhibit 6.</p> <p>4 THE STENOGRAPHER: Do you want this one</p> <p>5 with the exhibit sticker or the copy with the exhibit</p> <p>6 sticker?</p> <p>7 MR. BUSH: If Mr. Foster will indulge</p> <p>8 us, let's put a sticker on that one --</p> <p>9 THE DEPONENT: That's fine.</p> <p>10 MR. BUSH: -- and we'll give that --</p> <p>11 THE DEPONENT: I just want it back.</p> <p>12 MR. BUSH: You will get it back.</p> <p>13 (Exhibit Number 6 was marked.)</p> <p>14 MR. INOENCIO: May I interrupt for one</p> <p>15 second?</p> <p>16 MR. BUSH: Please.</p> <p>17 MR. INOENCIO: Bart, you said the</p> <p>18 EyeSite business plan was from 2004, correct?</p> <p>19 THE DEPONENT: I'm looking to see what</p> <p>20 the date is, but it's got -- well, there's two</p> <p>21 indications that it's 2004. One, the paper size is</p> <p>22 not the U.S. version of paper. It's -- so it was</p> <p>23 definitely printed in the UK. And I moved back in</p> <p>24 2004, so that would indicate -- yeah. Actually, it</p> <p>25 does have 2004 as the date on here.</p>

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1 MR. INOENCIO: Okay. Thank you. I
2 just wanted to be certain I heard you correctly.
3 THE DEPONENT: Yeah.
4 Q. (By Mr. Bush) So before we talk more
5 generally about the document we marked as Exhibit 6, I
6 want to go back to my question about -- in response to
7 your comment about all the different things that the
8 kiosk could test for that were being contemplated up
9 until February of 2006.
10 A. Yep. So some of the features -- so eye
11 health information, visual acuity, the need for new
12 prescription, strength of ready-readers, legal driving
13 requirements, tips on maintaining good vision, and
14 vision exams.
15 Q. And just so our record is clear, you're
16 referring to Exhibit 6 --
17 A. Correct.
18 Q. -- in giving that testimony, correct?
19 A. Correct. Exhibit 6, page 19.
20 "Enhancements and Follow-on Opportunities."
21 Clear vision: Automated vision
22 screening kiosk that also has the ability to show
23 consumers how they would see with corrected vision.
24 Provide a Prescription: Built-in
25 autorefractor provides consumer with a prescription.

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1 Consumer takes the prescription to the eye care
2 professional who completes a quick insertion removal.
3 Simple patients are given lenses. Difficult patients
4 that might include toric or progressive lenses are
5 then booked in for a follow-up appointment.
6 The third: Use barcode scanner to
7 accept payment. Consumer pays retailer at a till and
8 receives a barcoded slip.
9 Vending Plano FreshLook one-day contact
10 lenses. Allow consumers to see how they would look in
11 various colored contact lenses.
12 Visual eye care makeover and
13 autorefractor. Provide the consumer with color
14 recommendations and prescription. Consumer visits the
15 eye care professional for quick insertion removal
16 before purchasing lenses.
17 Allow consumers to order contact lenses
18 directly from the device.
19 Modified countertop design located near
20 ready-readers.
21 And then handwritten it has "Five-year
22 strategic plan. EyeSite is the entry product into
23 automated eye health and diagnostics. Our vision is
24 to expand into other areas including cholesterol
25 screening, diabetes, cough/cold, and DNA analysis."

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1 Q. And all those things that you read into
2 the record, Mr. Foster, those are all ideas on your
3 part in the 2004 time frame?
4 A. It was a mix of either myself and other
5 CIBA Vision employees.
6 Q. And who were the other CIBA Vision
7 employees?
8 A. It's hard to say at that time. I think
9 if we expanded to 2006 I could give you a couple
10 names.
11 Q. Please.
12 A. Rafael Andino would be a gentleman that
13 was in the -- one of the brainstorming meetings that
14 we expanded the intellectual property. His last name
15 would be A-n-d-i-n-o, Andino, I believe. He was in
16 the R&D department.
17 Q. Anyone else?
18 A. Not that I recall.
19 Q. And just so our record is clear, you
20 made reference a couple of times in describing these
21 additional things that could be tested.
22 You made reference to a "built-in
23 autorefractor"?
24 A. Correct.
25 Q. Can you explain to the jury what is

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1 meant by a built-in autorefractor?
2 A. Yeah. So an autorefractor is a common
3 piece of equipment that is in the optical industry
4 that allows you to assess someone's refraction, which
5 is how well you can see. And it gives you a pretty
6 accurate prescription.
7 Q. You also made reference to "EyeSite,"
8 and I want to make sure our record is clear by about
9 what you meant by the name EyeSite.
10 A. So EyeSite was the brand of kiosk that
11 would allow you to assess your vision or not, and it
12 was an internal name that we had -- or that I had come
13 up with.
14 Q. So the brand name EyeSite was your idea
15 for characterizing the vision acuity kiosk that you
16 had conceived in 2004?
17 A. Uh-huh.
18 Q. Is that correct?
19 A. Correct.
20 Q. Let's take a look at what we will mark
21 as Exhibit 7.
22 (Exhibit Number 7 was marked.)
23 Q. (By Mr. Bush) Mr. Foster, do you
24 recognize the document we marked as Exhibit 7?
25 A. I do.

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<p>1 Q. Can you identify Exhibit 7 for the</p> <p>2 record?</p> <p>3 A. A document dated April 5, 2006. It's</p> <p>4 to -- it looks like it's a contract of some sort for a</p> <p>5 services of collaboration agreement with signature</p> <p>6 lines from CIBA Vision and the City University of</p> <p>7 London, and it's unsigned.</p> <p>8 Q. Is it your memory that CIBA Vision</p> <p>9 ultimately executed an agreement with the City</p> <p>10 University of London so that CIBA Vision could</p> <p>11 integrate software developed by Dr. David Thomson into</p> <p>12 the vision acuity kiosk?</p> <p>13 A. That's correct.</p> <p>14 Q. Looking at the document we marked as</p> <p>15 Exhibit 7 -- and if you'll look on page 7, there's a</p> <p>16 color depiction on page 7 --</p> <p>17 A. Yes.</p> <p>18 Q. -- of Exhibit 7.</p> <p>19 And the first -- the first heading is</p> <p>20 "Overview of system."</p> <p>21 A. Yes.</p> <p>22 Q. Do you see that?</p> <p>23 A. I do.</p> <p>24 Q. Can you explain what is depicted in this</p> <p>25 color drawing on page 7 of Exhibit 7?</p>	<p>1 response pad, and if the letters got -- if you got the</p> <p>2 letters wrong, they'd get bigger.</p> <p>3 Q. And just so our record is clear, when</p> <p>4 you describe letters that the individual would be</p> <p>5 seeing, are you talking about an eye chart?</p> <p>6 A. That's correct.</p> <p>7 Q. Or something called a Snellen chart?</p> <p>8 A. That's right.</p> <p>9 Q. And just so our record is clear, let's</p> <p>10 mark as Exhibit 8.</p> <p>11 (Exhibit Number 8 was marked.)</p> <p>12 Q. (By Mr. Bush) Can you identify</p> <p>13 Exhibit 8 for our record?</p> <p>14 A. I can. It's a Snellen chart.</p> <p>15 Q. And so the Snellen chart is simply an</p> <p>16 eye chart that would be used in the mirror box that's</p> <p>17 depicted in on page 7 of Exhibit 7, correct?</p> <p>18 A. Correct.</p> <p>19 Q. And I've referred to the depiction on</p> <p>20 page 7 as Exhibit 7 as a "mirror box."</p> <p>21 Am I correct with that characterization?</p> <p>22 A. Correct.</p> <p>23 Q. Who first came up with the</p> <p>24 characterization of this functionality as a mirror</p> <p>25 box?</p>
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<p>1 A. I can. So there's two mirrors that are</p> <p>2 simulating roughly a 15-foot optical path. So it</p> <p>3 appears that you're looking down a long hallway as you</p> <p>4 look into the device. And it's bouncing off an LCD on</p> <p>5 the base of the device that's LCD 2. I don't know --</p> <p>6 yeah. Anyway, that's it.</p> <p>7 Q. (By Mr. Bush) And --</p> <p>8 A. That's what it's depicting.</p> <p>9 Q. No. That's helpful.</p> <p>10 And so the mirrors that are reflected in</p> <p>11 this depiction on page 7 of Exhibit 7 are used to</p> <p>12 simulate distance; is that correct?</p> <p>13 A. That's correct.</p> <p>14 Q. For purposes of providing vision</p> <p>15 screening and an eye exam, correct?</p> <p>16 A. That's correct.</p> <p>17 Q. And so can you describe what the</p> <p>18 individual engaged in the vision test would be seeing</p> <p>19 through these mirrors that are depicted on page 7 of</p> <p>20 Exhibit 7?</p> <p>21 A. So they would look through the device</p> <p>22 and see a series of letters that then you could -- so</p> <p>23 you would see letters on LCD screen 1 that's depicted</p> <p>24 in the drawing, and you would compare what you'd see</p> <p>25 on LCD 2. And you would input those responses on the</p>	<p>1 A. Dr. Thomson.</p> <p>2 Q. I'm going to hand you a document we will</p> <p>3 mark as Exhibit 9.</p> <p>4 (Exhibit Number 9 was marked.)</p> <p>5 Q. (By Mr. Bush) Mr. Foster, do you</p> <p>6 recognize the document we marked as Exhibit 9?</p> <p>7 A. I do.</p> <p>8 Q. Can you identify Exhibit 9 for the</p> <p>9 record?</p> <p>10 A. It's a letter dated -- I don't know the</p> <p>11 date. It doesn't say. But it's from Dr. Thomson. It</p> <p>12 appears to be an EyeSite project log, and it's marked</p> <p>13 "private and confidential."</p> <p>14 Q. And what is meant, in your</p> <p>15 understanding, by the heading "EyeSite project log"?</p> <p>16 A. It's -- it looks to be his notes of what</p> <p>17 he would do and some next steps and how he would</p> <p>18 accomplish the project.</p> <p>19 Q. In other words, Dr. Thomson's notes and</p> <p>20 next steps for integrating his software into the</p> <p>21 vision acuity kiosk?</p> <p>22 A. I'm not sure.</p> <p>23 Q. From your perspective, what is reflected</p> <p>24 in the document we've marked as Exhibit 9 in terms of</p> <p>25 next steps or tasks to be performed by Dr. Thomson?</p>

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1 A. Next steps appear to be noted in the
2 document as the CIBA team is going to comment on
3 potential designs of a booth and in particular the
4 septum approach, general considerations, target
5 conditions, proposal for software development.
6 The City team is to develop a flowchart
7 for software and commence developing interface.
8 Agreement reached with CIBA Vision about
9 design to mock-up at City University.
10 Technical team at City construct
11 prototype framework.
12 And software developers produce
13 prototype program.
14 Implementation of software on mock-up.
15 Q. Do you remember receiving this document
16 we marked as Exhibit 9 from Dr. Thomson?
17 A. I do.
18 Q. And if you'll look on the very last page
19 on the -- if you look on the back of the very last
20 page of the document we've marked as Exhibit 9, I
21 think it will give us the date of this document. It's
22 in the very back of the document.
23 Do you see a picture of the metadata for
24 the document?
25 A. Yes.

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1 Q. Do you see that?
2 A. I do.
3 Q. Are you able to identify the date of
4 this document?
5 A. I'm not.
6 Q. Do you see at the very top it says
7 "Info"?
8 A. Correct.
9 Q. And under that it has "2006-04-20
10 EyeSite project log 4."
11 A. Yeah.
12 Q. Does that appear to you to be the date
13 of this document?
14 A. I don't know.
15 Q. But it nonetheless reflects a date of
16 2006, April 20, correct?
17 A. Correct.
18 Q. And you mentioned a moment ago in
19 reading through the tasks and next steps of
20 Dr. Thomson a septum approach.
21 Can you explain what you meant by a
22 "septum approach"?
23 A. Well, I would have to refer to the
24 document. It's not something I'm familiar with. But
25 according to the notes -- I don't know what page it

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1 is. Just give me a second.
2 Q. Sure. Take your time.
3 A. I believe the septum approach refers to
4 having your head in a chin rest.
5 Q. In other words, the individual engaging
6 in the vision screening in the kiosk would have a chin
7 rest for their head while participating in the vision
8 screening?
9 A. Correct.
10 Q. On the first page of this document, it
11 states "the intention is to produce a computer-based
12 system for self-administered vision screening."
13 Do you see that?
14 A. Yes.
15 Q. And so Dr. Thomson's role was to execute
16 on the development of a computer-based system for the
17 vision acuity kiosk, correct?
18 A. That's correct.
19 Q. And this also says in the next paragraph
20 that "City University agree in principle to
21 collaborate with Bart Foster to develop a prototype of
22 the system."
23 Do you see that?
24 A. That's correct.
25 Q. Does this document refresh your

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1 recollection as to when the first prototype was
2 developed for the vision acuity kiosk?
3 A. I don't know.
4 Q. You don't remember?
5 A. I don't remember.
6 Q. Does Exhibit 9 refresh your recollection
7 that one of the next steps for Dr. Thomson was to
8 assist in the development of a prototype of the vision
9 acuity kiosk?
10 A. Yes. Well, the -- it does state in here
11 the feedback is from April 24, 2006. So I would
12 assume that this letter was prior to that.
13 Q. Before -- dated before April 24 of 2006?
14 A. Correct.
15 Q. And if you'll look through briefly
16 Exhibit 9, there are a number of color depictions in
17 this document --
18 A. Uh-huh.
19 Q. -- of the vision acuity kiosk
20 functionality.
21 And my question for you, generally, is
22 did you prepare these depictions, or did Dr. Thomson
23 prepare these depictions?
24 A. Dr. Thomson.
25 Q. Did you collaborate with Dr. Thomson in

Page 38	Page 40
1 the development of the depictions that are reflected	1 Q. I'm going to give you another document
2 in Exhibit 9?	2 we will mark as Exhibit 11.
3 A. Yes.	3 (Exhibit Number 11 was marked.)
4 Q. I'm going to give you a document we'll	4 Q. (By Mr. Bush) Mr. Foster, do you
5 mark as Exhibit 10.	5 recognize the document that we have marked as
6 (Exhibit Number 10 was marked.)	6 Exhibit 11?
7 A. You get all the good stuff. It's so	7 A. I do. It's an interoffice memorandum
8 great. Look at that.	8 dated 2006 to Michael Kehoe, who was CEO of CIBA
9 Q. (By Mr. Bush) Do you recognize the	9 Vision at the time.
10 document we've marked as Exhibit 10, Mr. Foster?	10 Q. And this is an interoffice memorandum
11 A. No.	11 that you prepared while you were employed at CIBA
12 Q. Do you know what is depicted in the	12 Vision?
13 photographs in the document we've marked as	13 A. That's correct.
14 Exhibit 10?	14 Q. In July of 2006?
15 A. Yes.	15 A. That's correct.
16 Q. Can you identify those photographs?	16 Q. And you said Michael Kehoe was the CEO
17 A. It's the first prototype of the EyeSite	17 of CIBA Vision?
18 kiosk.	18 A. That's correct.
19 Q. So Exhibit 10 reflects photographs of	19 Q. And what was your objective in preparing
20 the first prototype of the EyeSite kiosk that was	20 this interoffice memorandum that we've marked as
21 develop by yourself in collaboration with Dr. Thomson,	21 Exhibit 11?
22 correct?	22 A. What was my -- I'm sorry?
23 A. That's correct.	23 Q. Your objective. Your reason.
24 Q. Does Exhibit 10 refresh your	24 A. To gain clarity and commitment.
25 recollection as to the year in which this first	25 Q. Gain clarity and commitment for . . .
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1 prototype was developed?	1 A. The next steps, which are identified in
2 A. No.	2 the document.
3 Q. Was this prototype that is depicted in	3 Q. For next steps of the evolution and
4 Exhibit 10, was this developed in the United Kingdom,	4 deployment of the vision acuity kiosk?
5 or was --	5 A. That's accurate.
6 A. Yes.	6 Q. And this interoffice memorandum is cc'd
7 Q. -- it developed -- it was developed in	7 to Scott Meece.
8 the United Kingdom?	8 A. Correct.
9 A. Correct. It's the City University of	9 Q. And Scott Meece is the general counsel
10 London.	10 of CIBA Vision?
11 Q. And did you travel from CIBA Vision in	11 A. He is.
12 the United States to the United Kingdom to participate	12 Q. And it also is cc'd to Tariq Aziz.
13 in the development of this prototype?	13 Do you see that?
14 A. No.	14 A. I do.
15 Q. How did you come to be engaged in	15 Q. Can you identify Tariq Aziz for the
16 collaborating with Dr. Thomson in the development of	16 record?
17 the prototype? By long distance?	17 A. He was head of business development at
18 A. Correct.	18 the time.
19 Q. You were in regular communication with	19 Q. And what role, if any, did Tariq Aziz
20 Dr. Thomson?	20 play in the development of the EyeSite vision kiosk?
21 A. Yes.	21 A. None.
22 Q. About the development of the prototype?	22 Q. And what role, if any, did Scott Meece
23 A. Uh-huh.	23 play in the development of the EyeSite vision acuity
24 Q. Is that a yes?	24 kiosk?
25 A. Yes.	25 A. They both just provided guidance but not

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<p>1 any substantive technical guidance or anything like</p> <p>2 that.</p> <p>3 Q. Nothing substantive?</p> <p>4 A. No.</p> <p>5 Q. And what were the next steps for the</p> <p>6 EyeSite vision acuity kiosk for which you were seeking</p> <p>7 clarity and commitment in preparing this interoffice</p> <p>8 memorandum we've marked as Exhibit 11?</p> <p>9 A. You're asking -- sorry?</p> <p>10 Q. Yeah. What were the specific next steps</p> <p>11 for which you wanted clarity and commitment?</p> <p>12 A. Well, identify the document is -- I</p> <p>13 think it's listed. Do you want me to read them now?</p> <p>14 Q. Yeah. If you could identify them at a</p> <p>15 high level, that would be great.</p> <p>16 A. Yeah. They wanted to confirm that money</p> <p>17 was available, in this case 350,000 in 2006 for</p> <p>18 spending.</p> <p>19 Head count and a transition plan with</p> <p>20 KG, who is Karen Gough, who was head of North America</p> <p>21 at the time. So essentially getting her permission</p> <p>22 for me to join Tariq underneath the business</p> <p>23 development group.</p> <p>24 Review compensation related to that.</p> <p>25 And identify an executive committee</p>	<p>1 Q. And did that -- did you ultimately</p> <p>2 assume that role in January 2007?</p> <p>3 A. Yes.</p> <p>4 Q. And what did you perceive your duties</p> <p>5 and responsibilities to be when you assumed that new</p> <p>6 role for the EyeSite project in January of 2007?</p> <p>7 A. To build a prototype and test it in the</p> <p>8 U.S.</p> <p>9 Q. And when you say build and test a</p> <p>10 prototype in the U.S., you're referring to a vision</p> <p>11 acuity kiosk prototype?</p> <p>12 A. I'm not clear on that. It was -- it</p> <p>13 might have been broader than that.</p> <p>14 Q. What is your memory, sitting here today,</p> <p>15 about the scope of the prototype that was envisioned</p> <p>16 when you assumed the new role in January of 2007?</p> <p>17 A. It -- to start with visual acuity. I</p> <p>18 think that's accurate.</p> <p>19 THE DEPONENT: In probably the next</p> <p>20 15 minutes, I'll want just a short -- just a bio</p> <p>21 break, like ten minutes.</p> <p>22 MR. BUSH: Absolutely. We can do that</p> <p>23 right now. Let's go off the record.</p> <p>24 THE DEPONENT: Yeah. Is that all right?</p> <p>25 You guys --</p>
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<p>1 member or function that will manage the EyeSite and</p> <p>2 have Bart as a direct report, and it was suggested</p> <p>3 that -- either Michael or Tariq.</p> <p>4 Q. So did you subsequently join the</p> <p>5 business development division within CIBA Vision with</p> <p>6 Tariq in pursuing next steps for the EyeSite vision</p> <p>7 acuity kiosk?</p> <p>8 A. I did.</p> <p>9 Q. And did you subsequently identify an EC</p> <p>10 member that would manage the project and have you as a</p> <p>11 direct report?</p> <p>12 A. That would be Tariq.</p> <p>13 Q. And this all is in the second half of</p> <p>14 2006, correct?</p> <p>15 A. Correct.</p> <p>16 Q. And you're full-time employed at CIBA</p> <p>17 Vision at this point in time, correct?</p> <p>18 A. Yes. My new role with Tariq was to</p> <p>19 begin in January of 2007.</p> <p>20 Q. And can you say a little more about the</p> <p>21 new role that you assumed in January of 2007?</p> <p>22 A. Yes. I would be in -- I'd be managing a</p> <p>23 special project internally named EyeSite, report</p> <p>24 directly to Tariq, and have a budget that I would</p> <p>25 control, and that would begin in January of 2007.</p>	<p>1 MR. BUSH: That's great.</p> <p>2 THE VIDEOGRAPHER: We're going off the</p> <p>3 video record at 11:45 a.m.</p> <p>4 (Recess from 11:45 a.m. to 11:56 a.m.)</p> <p>5 THE VIDEOGRAPHER: We are back on the</p> <p>6 video record at 11:56 a.m.</p> <p>7 Q. (By Mr. Bush) Going back on the record,</p> <p>8 Mr. Foster, I'm going to hand you what we will mark as</p> <p>9 Exhibit 12.</p> <p>10 (Exhibit Number 12 was marked.)</p> <p>11 THE DEPONENT: Where did my Exhibit 6</p> <p>12 go?</p> <p>13 MR. BUSH: I have it.</p> <p>14 Q. (By Mr. Bush) Are you able to identify</p> <p>15 Exhibit 12, Mr. Foster?</p> <p>16 A. Exhibit 12 is a memo, interoffice memo,</p> <p>17 from Scott Meece, general counsel -- sorry -- to Scott</p> <p>18 Meece, general counsel, from myself, Bart Foster,</p> <p>19 dated August 23 of 2006.</p> <p>20 Q. And what was your objective in sending</p> <p>21 the interoffice memorandum that we've marked as</p> <p>22 Exhibit 12?</p> <p>23 A. To summarize previous discussions.</p> <p>24 Q. About next steps with the EyeSite vision</p> <p>25 acuity kiosk?</p>

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<p>1 A. Correct.</p> <p>2 Q. And what were the next steps that are</p> <p>3 summarized in the interoffice memorandum that we've</p> <p>4 marked as Exhibit 12?</p> <p>5 A. Proposed next steps were identified as</p> <p>6 "management approval of one of the options above.</p> <p>7 "Draft documents based on strategy</p> <p>8 chosen and assign appropriate resources."</p> <p>9 Q. In looking under the heading</p> <p>10 "Background," it says, "Therefore, CIBA Vision has</p> <p>11 invested money and resources in the concept, including</p> <p>12 filing a patent, developing the business plan, and</p> <p>13 completing qualitative market research to demonstrate</p> <p>14 viability."</p> <p>15 Do you see that?</p> <p>16 A. Uh-huh.</p> <p>17 Q. And is the business plan that's</p> <p>18 referenced in Exhibit 12 a reference to the document</p> <p>19 we've marked previously as Exhibit 6?</p> <p>20 A. Most likely.</p> <p>21 Q. And Exhibit 6 is the business plan that</p> <p>22 you prepared, correct?</p> <p>23 A. That's correct.</p> <p>24 Q. And the qualitative market research to</p> <p>25 demonstrate viability, were you involved in that</p>	<p>1 A. Correct. Option 3.</p> <p>2 Q. Option 3. "CIBA Vision is interested in</p> <p>3 seeing EyeSite succeed; and, therefore, would consider</p> <p>4 an option which would allow EyeSite to be successful</p> <p>5 outside of CIBA Vision."</p> <p>6 Do you see that?</p> <p>7 A. That's correct.</p> <p>8 Q. Can you say more about that spinout</p> <p>9 option that's referenced here in Exhibit 12?</p> <p>10 A. In what way?</p> <p>11 Q. What was being contemplated at the point</p> <p>12 in time of the document that we've marked as</p> <p>13 Exhibit 12 with respect to a potential spinout option?</p> <p>14 A. To do just that, to have a separate</p> <p>15 business outside of the core that would have a</p> <p>16 different management team run by me.</p> <p>17 Q. And that option was first conceived in</p> <p>18 the second half of 2006?</p> <p>19 A. Correct.</p> <p>20 Q. I'm going to hand you a document we will</p> <p>21 mark as Exhibit 13.</p> <p>22 (Exhibit Number 13 was marked.)</p> <p>23 Q. (By Mr. Bush) Do you recognize the</p> <p>24 document that we have marked as Exhibit 13,</p> <p>25 Mr. Foster?</p>
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<p>1 effort for market research and marketing plans?</p> <p>2 A. I was, yes.</p> <p>3 Q. Can you describe what steps you took in</p> <p>4 2006 around market research and marketing plans?</p> <p>5 A. We did qualitative research with focus</p> <p>6 groups in Chicago and London to assess whether --</p> <p>7 which I don't know if it was London. I knew -- I know</p> <p>8 we did it in Chicago. We did two different focus</p> <p>9 groups. I don't know the other location.</p> <p>10 Q. And what was the --</p> <p>11 A. The idea was --</p> <p>12 Q. Go ahead.</p> <p>13 A. The objective was to assess consumers'</p> <p>14 reaction to the kiosk; specifically, would they use</p> <p>15 it, would they expect to pay to use it, and would they</p> <p>16 be willing to pay to use it?</p> <p>17 Q. Do you remember what were the</p> <p>18 conclusions that resulted from the two focus groups?</p> <p>19 A. I do. It was very positive from a</p> <p>20 consumer standpoint saying that they would, in fact,</p> <p>21 use it. And it got significant -- helped get</p> <p>22 significant traction internally.</p> <p>23 Q. There is also a reference on Exhibit 12</p> <p>24 to a spinout option. If you see a sentence under</p> <p>25 background that says "to that end"?</p>	<p>1 A. I do.</p> <p>2 Q. Can you identify Exhibit 13 for the</p> <p>3 record?</p> <p>4 A. It's a document written by Scott Hampton</p> <p>5 of Can Do Medical dated October 15, 2006.</p> <p>6 Q. Who was Scott Hampton?</p> <p>7 A. He was a consultant to CIBA Vision.</p> <p>8 Q. Was Scott Hampton a consultant to CIBA</p> <p>9 Vision in connection with the EyeSite vision acuity</p> <p>10 kiosk project?</p> <p>11 A. Correct.</p> <p>12 Q. What was the role of Scott Hampton?</p> <p>13 What was his consulting role with respect to the</p> <p>14 vision acuity kiosk?</p> <p>15 A. Project manager.</p> <p>16 Q. And what did you understand Scott</p> <p>17 Hampton's duties and responsibilities to be in</p> <p>18 connection with serving as project manager?</p> <p>19 A. Interface between the software,</p> <p>20 hardware, user design groups and -- yeah.</p> <p>21 Q. What is depicted in Exhibit 13 from your</p> <p>22 perspective?</p> <p>23 A. It appears to be responsibilities</p> <p>24 identified in buckets showing Dr. Thomson, the user</p> <p>25 experience or user interface vendor, the kiosk vendor,</p>

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<p>1 which would be hardware, and a DB vendor, which I'm</p> <p>2 not sure what that is. Database, perhaps.</p> <p>3 Q. And these responsibilities that are</p> <p>4 depicted on the chart on the first page of Exhibit 13,</p> <p>5 are these responsibilities in connection with</p> <p>6 developing a prototype or in connection with</p> <p>7 developing a version of the kiosk that was subsequent</p> <p>8 to the prototype?</p> <p>9 A. Prototype.</p> <p>10 Q. So Exhibit 13 is specific to the</p> <p>11 development of the prototype kiosk?</p> <p>12 A. That's correct.</p> <p>13 Q. And the individuals involved in</p> <p>14 developing the prototype kiosk in October of 2006 were</p> <p>15 yourself, Scott Hampton, and Dr. Thomson, correct?</p> <p>16 A. Correct. There -- yeah. And there are</p> <p>17 some other vendors that are involved too.</p> <p>18 Q. And can you identify the other vendors</p> <p>19 that are involved at this point in time in 2006 in</p> <p>20 developing the prototype vision acuity kiosk?</p> <p>21 A. It was a company called Eyemaginations.</p> <p>22 Q. And what was the role of Eyemaginations?</p> <p>23 A. Software, basically a user -- more user</p> <p>24 friendly interface on top of Dr. Thomson's work, which</p> <p>25 is more technical.</p>	<p>1 quality assurance testing --</p> <p>2 A. That's right.</p> <p>3 Q. -- on the part of CIBA Vision in</p> <p>4 connection with the prototype of the vision acuity</p> <p>5 kiosk?</p> <p>6 A. Correct.</p> <p>7 Q. Do you know what conclusions were</p> <p>8 reached as a consequence of this testing and</p> <p>9 quality --</p> <p>10 A. They were --</p> <p>11 Q. -- assurance?</p> <p>12 A. They were favorable enough to move</p> <p>13 forward. I think there were some areas that might</p> <p>14 have needed to be improved, but I don't recall exactly</p> <p>15 what those were. But it was enough to move forward.</p> <p>16 Q. And what role, if any, did you play in</p> <p>17 the quality assurance testing that's reflected in</p> <p>18 Exhibit 14?</p> <p>19 A. None. Maybe project management or</p> <p>20 something, but that's oversight. But it wasn't</p> <p>21 anything substantial.</p> <p>22 Q. Let's take a look at what we will mark</p> <p>23 as Exhibit 15.</p> <p>24 (Exhibit Number 15 was marked.)</p> <p>25 Q. (By Mr. Bush) Do you recognize</p>
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<p>1 Q. Any other vendors come to mind in</p> <p>2 reviewing Exhibit 13?</p> <p>3 A. The kiosk vendor would have been Kiosk</p> <p>4 Information Systems based in Boulder, Colorado.</p> <p>5 Q. Any other vendor that comes to mind from</p> <p>6 the late 2006 time frame?</p> <p>7 A. No.</p> <p>8 Q. I'll give you a document that we will</p> <p>9 mark as Exhibit 14.</p> <p>10 (Exhibit Number 14 was marked.)</p> <p>11 Q. (By Mr. Bush) Mr. Foster, do you</p> <p>12 recognize Exhibit 14?</p> <p>13 A. No.</p> <p>14 Q. Are you able to identify Exhibit 14?</p> <p>15 A. It appears to be an internal memo:</p> <p>16 sponsor of CIBA Vision, protocol name the EyeSite</p> <p>17 vision kiosk -- different protocols of some sort. The</p> <p>18 author is Rajni Singh, OD.</p> <p>19 Q. Are any of these names familiar to you</p> <p>20 on the first page of Exhibit 14?</p> <p>21 A. Peter Bergenske sounds familiar. Yeah.</p> <p>22 These -- these were internal QA -- I think these were</p> <p>23 internal people that were going to do testing to see</p> <p>24 how accurate the kiosk was.</p> <p>25 Q. So Exhibit 14 reflects some internal</p>	<p>1 Exhibit 15, Mr. Foster?</p> <p>2 A. I don't. It seems to be similar to the</p> <p>3 last document, perhaps with data.</p> <p>4 Q. So Exhibit 15 appears to be another</p> <p>5 report or output from the quality assurance testing</p> <p>6 conducted by CIBA Vision?</p> <p>7 A. That's correct.</p> <p>8 Q. With respect to the prototype vision</p> <p>9 acuity kiosk?</p> <p>10 A. Correct.</p> <p>11 Q. And Exhibit 15 is dated March 15 of</p> <p>12 2007, correct?</p> <p>13 A. Yes. February 2007.</p> <p>14 Q. I'm going give you a document we will</p> <p>15 mark as Exhibit 16.</p> <p>16 (Exhibit Number 16 was marked.)</p> <p>17 Q. (By Mr. Bush) Do you recognize the</p> <p>18 document we've marked as Exhibit 16?</p> <p>19 A. I do.</p> <p>20 Q. Can you identify Exhibit 16 for the</p> <p>21 record?</p> <p>22 A. "Implementation Planning of</p> <p>23 Initiatives."</p> <p>24 Q. Does Exhibit 16 refresh your</p> <p>25 recollection as to the timing of the development of</p>

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1 the vision acuity prototype kiosk?
2 A. No. Well, it says "Q4 2006."
3 THE STENOGRAPHER: It says what?
4 A. "Q4 2006 Develop Beta prototype." It
5 says "completed."
6 Q. (By Mr. Bush) Does this document we've
7 marked as Exhibit 16 refresh your recollection as to
8 the timing during which the prototype for the vision
9 acuity kiosk was completed?
10 A. Yeah. It would have been July or --
11 actually, maybe September of 2006.
12 Q. So by roughly September of 2006, CIBA
13 Vision had completed a prototype for the vision acuity
14 kiosk that had been part of the project in which you
15 had been engaged since 2004?
16 A. That's correct.
17 Q. I'll give you a document that we will
18 mark as Exhibit 17.
19 (Exhibit Number 17 was marked.)
20 THE DEPONENT: That's a pretty good
21 document right there.
22 MR. JESSER: Yeah.
23 THE DEPONENT: Yeah. I love this.
24 Q. (By Mr. Bush) You're looking at
25 Exhibit 17?

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1 A. Yeah.
2 Q. And what do you love about it?
3 A. Just that I haven't looked at it in
4 20 years. It's the initial invoice for the first
5 prototype, I think, or part of it.
6 Q. And who is the invoice from for the
7 first prototype in the document we've marked as
8 Exhibit 17?
9 A. Kiosk Information Systems.
10 Q. And what was the role of Kiosk
11 Information Systems in connection with the development
12 of the first vision acuity prototype?
13 A. To develop the hardware for the kiosk
14 itself.
15 Q. And what did that hardware include?
16 A. It included the shell, the monitors, the
17 internal mirror configuration.
18 Q. It included the mirror box?
19 A. Correct.
20 Q. And if you'll turn to the next-to-last
21 page, it's a full-page photograph of several
22 individuals standing next to --
23 A. Yeah.
24 Q. -- a kiosk.
25 A. Sorry. I get excited. It's like when

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1 my baby came to life.
2 Q. You said this is a picture of when your
3 baby came to life?
4 A. Yeah.
5 Q. And what is your baby that's reflected
6 in this photograph that's a part of Exhibit 17?
7 A. Which photo are you referring to?
8 Q. (Indicating.)
9 A. That's the first prototype in -- so
10 that's in their offices in Louisville, Colorado, and
11 that was the first prototype that we made here.
12 The prior one -- I don't remember the
13 exhibit we had that's pictures -- with Dr. Thomson
14 that was in the UK. That was in 2004, and that was --
15 I never touched that one.
16 This is the first one I actually felt.
17 And it was a little bit different, but yeah. And then
18 that other picture is the same unit. It's just
19 painted.
20 Q. All right. Hang on. I want to make
21 sure our record is clear.
22 A. And this is not referenced in anything.
23 Q. Hang on. Looking at Exhibit 10 --
24 A. 10.
25 Q. -- the document we previously marked as

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1 Exhibit 10 --
2 A. Okay.
3 Q. -- and when you were describing a moment
4 ago a prototype kiosk that you never were able to
5 touch, I just want to make sure that you were
6 referencing the kiosk that's --
7 A. Number 10, correct.
8 Q. -- in Exhibit 10?
9 A. Correct. I saw these pictures, and this
10 was created after this.
11 Q. In other words Exhibit --
12 A. -- 17 -- Exhibit 17 was created after
13 Exhibit 10.
14 Q. The photograph of the kiosk that's
15 reflected in Exhibit 17 was created after the kiosk
16 that's in the photograph in Exhibit 10, correct?
17 A. That's correct.
18 Q. And in Exhibit 17, I'm looking at the
19 third -- the backside of the third page of
20 Exhibit 17 --
21 A. Let me see.
22 Q. -- that is a photograph --
23 A. Correct.
24 Q. -- of six individuals standing next to a
25 kiosk.

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<p>1 Do you see that?</p> <p>2 A. That's correct.</p> <p>3 Q. And you referenced earlier the idea that</p> <p>4 the kiosk in this photograph was your baby, correct?</p> <p>5 A. Correct.</p> <p>6 Q. Who were the individuals who are</p> <p>7 included in this photograph standing next to the</p> <p>8 kiosk?</p> <p>9 A. The person to my right is Tom Weaver,</p> <p>10 who is head of sales. And the person to the left of</p> <p>11 the kiosk is named Abby Boes, spelled B-o-e-s. And</p> <p>12 I'm not sure of the other people.</p> <p>13 Q. And that's yourself standing on the</p> <p>14 opposite side of the kiosk on the other side of Abby</p> <p>15 Boes, correct?</p> <p>16 A. That's correct.</p> <p>17 Q. And you and Tom Weaver and Abby Boes all</p> <p>18 are employed by CIBA Vision?</p> <p>19 A. No.</p> <p>20 Q. Okay. Who is the employer for Tom</p> <p>21 Weaver?</p> <p>22 A. Kiosk Information Systems.</p> <p>23 Q. And who is Abby's employer?</p> <p>24 A. Kiosk Information Systems. I'm the only</p> <p>25 CIBA Vision employee pictured.</p>	<p>1 Q. And you were looking for a brand name;</p> <p>2 is that --</p> <p>3 A. Correct.</p> <p>4 Q. -- right?</p> <p>5 And you provided ideas or some</p> <p>6 guidelines around what you were looking for to,</p> <p>7 roughly, 30 friends to invite their ideas?</p> <p>8 A. Correct.</p> <p>9 Q. And you got back ideas that put you at a</p> <p>10 place of landing at SoloHealth?</p> <p>11 A. Yes.</p> <p>12 Q. And why did you pick SoloHealth?</p> <p>13 A. It sounded better than Pursuant Health.</p> <p>14 That's a joke. Sorry.</p> <p>15 Q. Was Pursuant Health an option?</p> <p>16 A. I had to say that because -- yeah. It</p> <p>17 was do-it-yourself healthcare. "Solo," do it</p> <p>18 yourself, "Health."</p> <p>19 Q. Is there any difference between the</p> <p>20 kiosk that's reflected in the picture on the last page</p> <p>21 of Exhibit 17 and the picture of the kiosk that's</p> <p>22 reflected on the next-to-last page of Exhibit 17 that</p> <p>23 has all the other individuals standing next to the</p> <p>24 kiosk?</p> <p>25 A. (Indicating.)</p>
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<p>1 Q. So all the individuals in this picture,</p> <p>2 other than yourself, are working for the manufacturer</p> <p>3 of the prototype?</p> <p>4 A. That's correct.</p> <p>5 Q. And if you'll look at the very last page</p> <p>6 of Exhibit 17, there is a picture of a kiosk that has</p> <p>7 branding on it.</p> <p>8 Do you see that --</p> <p>9 A. That's --</p> <p>10 Q. -- last page?</p> <p>11 A. -- correct, yes.</p> <p>12 Q. What's reflected in that photograph of</p> <p>13 that kiosk?</p> <p>14 A. A prototype with branding of EyeSite</p> <p>15 free vision test and SoloHealth.</p> <p>16 Q. And how did the name SoloHealth come</p> <p>17 about in the time frame of October of 2006?</p> <p>18 A. I emailed 30 friends and gave them the</p> <p>19 requirements of what I was looking for, and I got 50</p> <p>20 ideas back and selected the one I liked the best.</p> <p>21 Q. And can you say a little more about the</p> <p>22 requirements of what you were looking for?</p> <p>23 What were you looking for?</p> <p>24 A. Something that represented</p> <p>25 do-it-yourself healthcare.</p>	<p>1 Q. This is the last page of Exhibit 17.</p> <p>2 A. You're asking . . .</p> <p>3 Q. What is the difference between the last</p> <p>4 page of Exhibit 17 and the next-to-last page?</p> <p>5 A. Clearly, the branding and the color. So</p> <p>6 it's -- there's a -- it was painted in a powder blue,</p> <p>7 and then it was mocked up with some stickers in white.</p> <p>8 And the software may have changed slightly since those</p> <p>9 two, but it's hard to tell.</p> <p>10 Q. Now, when you landed upon the branding</p> <p>11 SoloHealth, was this going to be the brand name for</p> <p>12 the kiosk or the brand name for a company?</p> <p>13 A. A company.</p> <p>14 Q. And at what time did you first begin to</p> <p>15 contemplate a separate company under the name</p> <p>16 SoloHealth?</p> <p>17 A. It would have been in 2006.</p> <p>18 Q. And how did that contemplation come</p> <p>19 about? In other words, how did you come to decide</p> <p>20 upon organizing a separate company to execute on the</p> <p>21 vision acuity kiosk idea?</p> <p>22 A. Scott Meece, general counsel, and head</p> <p>23 of business development, Tariq Aziz, we had a meeting</p> <p>24 probably mid-2006. And they informed me that</p> <p>25 Novartis, who is the parent company of CIBA Vision,</p>

Page 62	<p>1 doesn't invest in things that plug into the wall.</p> <p>2 And they said they would, unfortunately,</p> <p>3 not support from a funding standpoint, and they</p> <p>4 suggested that I go back to North America in my day</p> <p>5 job. And in the same meeting said that if I really</p> <p>6 wanted to pursue it and stick with it that they would</p> <p>7 support a spinout.</p> <p>8 THE STENOGRAPHER: Support a what?</p> <p>9 THE DEPONENT: Spinout.</p> <p>10 Q. (By Mr. Bush) So Novartis told you that</p> <p>11 because they didn't invest in things that plug into</p> <p>12 the wall, you would have to go back to your prior role</p> <p>13 within CIBA Vision, unless your chose to take the idea</p> <p>14 to a separate company?</p> <p>15 A. That's correct.</p> <p>16 Q. What factored into your decision-making</p> <p>17 around whether to go back to your prior role at CIBA</p> <p>18 Vision or instead form a separate company?</p> <p>19 A. It wasn't a -- I had already made the</p> <p>20 decision.</p> <p>21 Q. And when did you make that decision?</p> <p>22 A. The same day that I was in the focus</p> <p>23 groups behind the two-way glass in Chicago.</p> <p>24 Q. Do you remember when that took place,</p> <p>25 the focus group in Chicago?</p>	Page 64	<p>1 Q. Potential funding and support for the</p> <p>2 EyeSite kiosk?</p> <p>3 A. Correct.</p> <p>4 Q. Was the document we marked as Exhibit 18</p> <p>5 developed in connection with your decision to form a</p> <p>6 separate company?</p> <p>7 A. Say that one more time.</p> <p>8 Q. Was the document -- did you create the</p> <p>9 document we marked as Exhibit 18 in connection with</p> <p>10 your decision to form a separate company to execute on</p> <p>11 the vision acuity kiosk idea?</p> <p>12 A. It's hard to say. I don't --</p> <p>13 Q. Looking --</p> <p>14 A. So this was actually -- so this document</p> <p>15 here, if you look on page -- the last page in yellow,</p> <p>16 this was a document to help companies -- it was for an</p> <p>17 RFP.</p> <p>18 Q. So you prepared Exhibit 18 in -- to</p> <p>19 assist CIBA Vision in developing an RFP for moving to</p> <p>20 next steps for the vision acuity kiosk?</p> <p>21 A. That's correct.</p> <p>22 Q. And what was the reason for an RFP</p> <p>23 process within CIBA Vision for the vision acuity</p> <p>24 EyeSite kiosk?</p> <p>25 A. Because the procurement group wanted to</p>
Page 63	<p>1 A. I don't.</p> <p>2 Q. It was in 2006?</p> <p>3 A. It could have been '05.</p> <p>4 Q. But it was no later than 2006?</p> <p>5 A. Correct.</p> <p>6 Q. I'm going to give you a document,</p> <p>7 Mr. Foster, that we will mark as Exhibit 18.</p> <p>8 (Exhibit Number 18 was marked.)</p> <p>9 Q. (By Mr. Bush) Do you recognize the</p> <p>10 document we've marked as Exhibit 18 --</p> <p>11 A. Yes.</p> <p>12 Q. -- Mr. Foster?</p> <p>13 Can you identify Exhibit 18 for the</p> <p>14 record?</p> <p>15 A. It's a document dated November 2006.</p> <p>16 "Automated Eye Health Kiosk EyeSite. Confidential,</p> <p>17 not to be distributed." It's an internal document</p> <p>18 inside CIBA Vision.</p> <p>19 Q. Did you prepare the document we marked</p> <p>20 as Exhibit 18?</p> <p>21 A. I did.</p> <p>22 Q. And what was your objective in preparing</p> <p>23 the document we marked as Exhibit 18?</p> <p>24 A. To gain support internally from</p> <p>25 executive management and potential funding.</p>	Page 65	<p>1 make sure we were getting the best pricing from</p> <p>2 potential vendors.</p> <p>3 Q. The RFP would be directed towards</p> <p>4 identifying a vendor to develop the next iteration of</p> <p>5 the vision acuity kiosk?</p> <p>6 A. I believe so.</p> <p>7 Q. And if you'll look with me at the second</p> <p>8 page of the document we've marked as Exhibit 18. It</p> <p>9 incorrectly has "20" at the bottom on the right.</p> <p>10 A. Correct.</p> <p>11 Q. It's photographs of potential</p> <p>12 locations --</p> <p>13 A. Yeah.</p> <p>14 Q. -- for the kiosks.</p> <p>15 Can you explain what's being depicted on</p> <p>16 this page with the heading "Potential Locations"?</p> <p>17 A. Sure. Those are graphic renditions of</p> <p>18 potential locations where we could find the kiosk.</p> <p>19 Q. And these are all high-traffic retail</p> <p>20 locations?</p> <p>21 A. That's correct.</p> <p>22 Q. And looking on the opposite side of that</p> <p>23 same page, the heading is "The EyeSite Kiosk</p> <p>24 Printout."</p> <p>25 A. Yes.</p>

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<p>1 Q. Do you see that?</p> <p>2 A. Correct.</p> <p>3 Q. Can you say more about the EyeSite kiosk</p> <p>4 printout and what is meant to be reported on the</p> <p>5 EyeSite report --</p> <p>6 A. Sure.</p> <p>7 Q. -- printout?</p> <p>8 A. So vision results, near and distance.</p> <p>9 There would be: A disclaimer; general eye health</p> <p>10 information, including legal driving requirements; the</p> <p>11 nearest eye care provider; phone numbers; available</p> <p>12 appointment times; manufacturer information discounts;</p> <p>13 retailer or eye care provider discounts; and</p> <p>14 advertising.</p> <p>15 Q. And looking at the photograph to the</p> <p>16 right on this page with the heading "EyeSite Kiosk</p> <p>17 Printout," that's a photograph of a sample or a</p> <p>18 template for the kiosk printout; is that correct?</p> <p>19 A. That's correct.</p> <p>20 Q. And the kiosk printout is what an</p> <p>21 individual would receive after engaging in the vision</p> <p>22 screening functionality offered by the kiosk, correct?</p> <p>23 A. That's correct.</p> <p>24 Q. And the vision -- the EyeSite report</p> <p>25 printout would allow an individual, then, to go</p>	<p>1 A. That's right.</p> <p>2 Q. -- correct?</p> <p>3 And then your patent was published for</p> <p>4 the first time in February of 2006?</p> <p>5 A. That's right.</p> <p>6 Q. And the development of the prototype</p> <p>7 started in May of 2006?</p> <p>8 A. Yes.</p> <p>9 Q. And the concept was presented to select</p> <p>10 retailers in the summer of 2006, correct?</p> <p>11 A. Correct.</p> <p>12 Q. What were -- who were the retailers to</p> <p>13 whom this concept was presented in 2006?</p> <p>14 A. Walmart.</p> <p>15 Q. And do you remember the reaction of</p> <p>16 Walmart?</p> <p>17 A. No.</p> <p>18 Q. Were you involved in the presentation to</p> <p>19 Walmart?</p> <p>20 A. No.</p> <p>21 Q. Who was involved in the presentation to</p> <p>22 Walmart?</p> <p>23 A. Dennis Kane.</p> <p>24 Q. Oh, on behalf of CIBA Vision?</p> <p>25 A. Correct. And likely Ray Pasco.</p>
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<p>1 procure corrective lens based on the reports of the</p> <p>2 test of the vision of that individual, correct?</p> <p>3 A. Correct.</p> <p>4 Q. Looking at the page with the heading</p> <p>5 "EyeSite History: Milestones Achieved," that has a</p> <p>6 "4" at the bottom of the page.</p> <p>7 A. Yes.</p> <p>8 Q. Do you see the dates with the different</p> <p>9 milestones on this page with the heading "EyeSite</p> <p>10 History"?</p> <p>11 A. I do.</p> <p>12 Q. Are these dates all true and correct?</p> <p>13 A. I don't know if the top one is accurate.</p> <p>14 Q. And that's why I ask. It says the</p> <p>15 "EyeSite concept was conceived in the UK."</p> <p>16 Do you see that?</p> <p>17 A. That's correct.</p> <p>18 Q. And you told me earlier the EyeSite</p> <p>19 concept was conceived in February of 2004, correct?</p> <p>20 A. Correct.</p> <p>21 Q. And then CIBA Vision invests in the</p> <p>22 market research in August of 2004, correct?</p> <p>23 A. Correct.</p> <p>24 Q. And those results were successful and</p> <p>25 confirmed the value of the concept --</p>	<p>1 Q. I'll give you a document we will mark as</p> <p>2 19.</p> <p>3 (Exhibit Number 19 was marked.)</p> <p>4 Q. (By Mr. Bush) Mr. Foster, do you</p> <p>5 recognize the document we've marked as Exhibit 19?</p> <p>6 A. I do.</p> <p>7 Q. Can you identify Exhibit 19 for the</p> <p>8 record?</p> <p>9 A. It's a "Request For Proposal. EyeSite</p> <p>10 Kiosk Prototype Project" dated November 21, 2006. No.</p> <p>11 It's when responses are due.</p> <p>12 Q. So this RFP that we've marketed as</p> <p>13 Exhibit 19 was prepared at some point before</p> <p>14 November 21 of 2006?</p> <p>15 A. Correct.</p> <p>16 Q. And to whom did you send the RFP?</p> <p>17 A. I would reference -- actually, from</p> <p>18 recollection, IBM, NCR, Kiosk Information Systems --</p> <p>19 Q. Do you --</p> <p>20 A. -- and likely three more.</p> <p>21 I'm not sure.</p> <p>22 Q. I understand. Do you remember which</p> <p>23 company was selected, which response to the RFP was</p> <p>24 chosen?</p> <p>25 A. Kiosk Information Systems for the</p>

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<p>1 hardware. Yeah.</p> <p>2 Q. Was there a separate vendor for any</p> <p>3 other components for the kiosk?</p> <p>4 A. There was.</p> <p>5 Q. And I know I'm testing your memory here.</p> <p>6 A. Yeah.</p> <p>7 Q. Whatever you remember.</p> <p>8 A. I don't.</p> <p>9 Q. You don't remember any other vendor, at</p> <p>10 this point in time, other than Kiosk Information</p> <p>11 Systems?</p> <p>12 A. The software vendor -- so Eyemaginations</p> <p>13 played a role. The CEO was Jeff Peres, P-e-r-e-s.</p> <p>14 And --</p> <p>15 Q. He was the CEO for the software vendor?</p> <p>16 A. For the software company.</p> <p>17 Q. And was Dr. David Thomson still involved</p> <p>18 at this point in time?</p> <p>19 A. Limited, if any. Yeah. Limited</p> <p>20 probably.</p> <p>21 Q. So as a consequence of submitting the</p> <p>22 RFP we've marked as Exhibit 19, CIBA Vision selected</p> <p>23 Kiosk Information Systems, Eyemagination, and a</p> <p>24 software vendor, whose name you can't remember, but</p> <p>25 the CEO was Jeff Peres?</p>	<p>1 Q. I want to give you a document we'll mark</p> <p>2 as Exhibit 20.</p> <p>3 (Exhibit Number 20 was marked.)</p> <p>4 Q. (By Mr. Bush) Mr. Foster, do you</p> <p>5 recognize the document we've marked as Exhibit 20?</p> <p>6 A. I don't.</p> <p>7 Q. Do you believe this is a document in</p> <p>8 which you were involved in preparing or developing?</p> <p>9 A. Yes. Likely.</p> <p>10 Q. And what is captured in the document</p> <p>11 we've marked as Exhibit 20?</p> <p>12 A. It looks to be key milestones with</p> <p>13 responsibilities.</p> <p>14 Q. Key milestones related to the marketing</p> <p>15 and to implementation on the idea?</p> <p>16 A. Correct.</p> <p>17 Q. And on the second page of the document</p> <p>18 we've marked as Exhibit 20, there's a list of</p> <p>19 different methods for expanding the usage of the</p> <p>20 kiosk; is that correct?</p> <p>21 A. The back of the first page?</p> <p>22 Q. No. The second -- the second page. The</p> <p>23 front of the second page?</p> <p>24 A. It starts with 2.1?</p> <p>25 Q. Correct.</p>
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<p>1 A. No. The CEO of the software vendor,</p> <p>2 Jeff Peres, was at Eyemaginations.</p> <p>3 Q. So Eyemaginations was the software</p> <p>4 vendor that was selected?</p> <p>5 A. Yes.</p> <p>6 Q. And looking at the back of the first</p> <p>7 page of the document we've marked as Exhibit 19, this</p> <p>8 says that CIBA Vision wishes to engage suppliers to</p> <p>9 assist in developing twelve eye care kiosks for the</p> <p>10 U.S. and six for the UK.</p> <p>11 Do you see that?</p> <p>12 A. I do.</p> <p>13 Q. Did that ultimately happen?</p> <p>14 A. No.</p> <p>15 Q. What ultimately happened as a result of</p> <p>16 this RFP process? How many kiosks were developed?</p> <p>17 A. Five.</p> <p>18 Q. Do you have a memory as to why a reduced</p> <p>19 number of kiosks were developed?</p> <p>20 A. I don't.</p> <p>21 Q. And those five kiosks were developed in</p> <p>22 late 2006 and 2007; is that correct?</p> <p>23 A. Say the dates again.</p> <p>24 Q. Late 2006 and 2007.</p> <p>25 A. That's correct.</p>	<p>1 A. And what's the question?</p> <p>2 Q. Does this identify methods for expanding</p> <p>3 the usage of the kiosk by consumers?</p> <p>4 A. No.</p> <p>5 Q. At the top it says "Test Expansion</p> <p>6 Marketing Support Plan."</p> <p>7 Do you see that?</p> <p>8 A. Yes.</p> <p>9 Q. Can you describe what is being reflected</p> <p>10 on this page under "Phase 2: Test Expansion Marketing</p> <p>11 Support Plan"?</p> <p>12 A. Refining the target audience,</p> <p>13 understanding what success looks like, testing various</p> <p>14 messaging related to attracting people to use it,</p> <p>15 understanding what partners -- the user interface</p> <p>16 itself.</p> <p>17 Q. So these are all ideas for growing the</p> <p>18 use of the kiosk by consumers, correct?</p> <p>19 A. No.</p> <p>20 Q. Then how would you describe these</p> <p>21 examples?</p> <p>22 A. Things that we want to learn about the</p> <p>23 market and the consumers. It has to do with in-store</p> <p>24 awareness, promotional messaging.</p> <p>25 Q. And did you ultimately gain the</p>

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1 intelligence and data points that you were looking to
2 learn about how to market to the consumers?
3 A. Yes. There was another firm called
4 MAYA. MAYA Design that was instrumental, and the
5 principal there was Nick McManus.
6 Q. And --
7 A. And he probably had a role in this
8 document too.
9 Q. And what was the role of MAYA Design?
10 They had a marketing role?
11 A. No. MAYA Design was for usability and
12 human-centered design.
13 Q. And you found them helpful?
14 A. Very. Yeah.
15 Q. I'll give you a document we'll mark as
16 Exhibit 21.
17 (Exhibit Number 21 was marked.)
18 Q. (By Mr. Bush) Do you recognize the
19 document we've marked as Exhibit 21, Mr. Foster?
20 A. I do.
21 Q. Can you identify it for the record?
22 A. Strategic Milestones starting with
23 June 20, 2007.
24 Q. And are these dates true and correct to
25 the best of your memory, the dates that are reflected

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1 on Exhibit 21?
2 A. I don't know.
3 Q. And the first task is to "Provide CV
4 Term Sheet" by June 20, 2007.
5 Do you see that?
6 A. Yes.
7 Q. What's being referenced by that task, a
8 "CV Term Sheet"?
9 A. A CIBA Vision Term Sheet would
10 contemplate an assignment of the intellectual property
11 to new co.
12 Q. And when you say "new co.," you're
13 talking about the new company to be known as
14 SoloHealth?
15 A. Correct.
16 Q. And what was the intellectual property
17 to be assigned from CIBA Vision to SoloHealth?
18 A. The patent named in Exhibit -- whatever.
19 Q. The patent for which you were the named
20 inventor?
21 A. Correct.
22 Q. Because that patent had been assigned to
23 CIBA Vision, correct?
24 A. Correct.
25 Q. And did CIBA Vision ultimately assign

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1 the Foster patent to SoloHealth?
2 A. They did.
3 Q. And let's look at what we will mark as
4 Exhibit 22.
5 (Exhibit Number 22 was marked.)
6 Q. (By Mr. Bush) Do you recognize the
7 document we've marked as Exhibit 22?
8 A. I do.
9 Q. And this is a letter of intent between
10 yourself and Dr. Kevin Lavery correct?
11 A. That's correct.
12 Q. And how did you first come to learn of
13 Dr. Kevin Lavery?
14 A. The Novartis patent department in
15 Switzerland called and told me about him.
16 Q. And when did that phone call from the
17 Novartis patent department take place?
18 A. I'm not sure.
19 Q. Sometime in 2006?
20 A. Likely.
21 Q. You likely learned about Dr. Lavery in
22 2006, but you can't say for certain?
23 A. Correct.
24 Q. When was the first time you interacted
25 with Dr. Lavery?

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1 A. On the phone around -- within a week of
2 learning about him from Novartis.
3 Q. And what was your reason for reaching
4 out to Dr. Lavery by phone after you learned about him
5 from Novartis?
6 A. Our attorneys said that he had a patent
7 that wasn't exactly what we were doing, but it was
8 written very broadly. And there was potential
9 infringement, and they wanted to make me aware and
10 asked if I was aware and I said no.
11 Q. Did you subsequently review Dr. Lavery's
12 patent?
13 A. I did.
14 Q. And what were your conclusions after you
15 read Dr. Lavery's patent?
16 A. It wasn't what we were doing.
17 Q. And when you say "it wasn't what we were
18 doing," you're talking about the EyeSite vision acuity
19 kiosk?
20 A. Correct.
21 Q. And how is the conception embedded in
22 Dr. Lavery's patent different from the EyeSite vision
23 acuity kiosk in which you were engaged?
24 A. I don't know.
25 Q. But it's your testimony you concluded at

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1 the time that Dr. Lavery's patent was different from
2 what you were doing with the EyeSite vision acuity
3 kiosk, correct?
4 A. I don't know.
5 Q. I'm just -- followed up on your
6 testimony.
7 A. I'm not a patent attorney. I have no
8 idea. I just know what they told me, which was, Hey,
9 we could potentially be infringing, so you might want
10 to learn more.
11 Q. And you told me earlier that
12 Dr. Lavery's patent was different from what we were
13 doing, and I just want to understand what you meant by
14 that statement.
15 A. It contemplated a retinal camera in the
16 device that wasn't -- not in my -- it wasn't in the
17 opportunity set that I had considered.
18 Q. Did you have the objective of including
19 a retinal camera in the kiosk that you had developed?
20 A. No.
21 Q. What was your objective in entering into
22 the letter of intent with Dr. Lavery that we've marked
23 as Exhibit 22?
24 A. To have leverage with CIBA Vision and
25 Novartis.

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1 Q. And what do you mean by that? What kind
2 of leverage were you looking for with CIBA Vision and
3 Novartis?
4 A. To be able to acquire the intellectual
5 property that they had on the EyeSite kiosk.
6 Q. In other words, leverage to acquire from
7 CIBA Vision the patent for which you were the named
8 inventor?
9 A. Correct.
10 Q. And that was your objective in entering
11 into the letter of intent with Dr. Lavery?
12 A. Yes.
13 Q. Was there any other objective that you
14 had in mind when you entered into the letter of intent
15 with Dr. Lavery?
16 A. I don't think so.
17 Q. And how did acquiring -- how did the
18 letter of intent that you executed with Dr. Lavery,
19 how did that provide leverage to you in your
20 negotiations with CIBA Vision and Novartis?
21 A. Dr. Lavery had an issued patent, which
22 was much stronger than -- in my view was much stronger
23 than a patent pending.
24 Q. Okay. And the patent for which you were
25 a named inventor, at least at this point in time, was

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1 not an issued patent?
2 A. Correct.
3 Q. When you entered into the letter of
4 intent with Dr. Lavery, did you have the objective of
5 obtaining any other intellectual property from
6 Dr. Lavery, other than his issued patent?
7 A. Maybe a little strategic guidance or
8 consultation because he's an ophthalmologist.
9 Q. Did you ultimately enter into a
10 consulting agreement with Dr. Lavery in order to
11 obtain that strategic guidance and consultation?
12 A. We did. We did.
13 Q. Was there any other specific
14 intellectual property that you hoped to obtain from
15 Dr. Lavery, other than his issued patent?
16 A. No, not that I'm aware of.
17 MR. BUSH: All right. Let's go off the
18 record. I'm at a great stopping place for lunch.
19 THE VIDEOGRAPHER: We are going off the
20 video record at 12:49 p.m.
21 (Recess from 12:49 p.m. to 1:58 p.m.)
22 (Mr. Jesser was not present.)
23 THE VIDEOGRAPHER: This is Media
24 Number 2 in the continuing deposition of Bart Foster.
25 We are back on the record at 1:58 p.m.

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1 Q. (By Mr. Bush) Mr. Foster, going back on
2 the record, you mentioned you have an additional
3 document with you that we might want to mark as an
4 exhibit; is that correct?
5 A. Yeah. This is a business recommendation
6 dated July -- July of 2006 that I had -- that I just
7 found at home.
8 THE DEPONENT: Bruce, it looks like that
9 on the cover.
10 MR. INOSENIO: Okay.
11 Q. (By Mr. Bush) And we will mark this
12 July 2006 business recommendation as Exhibit 23. And
13 with your indulgence, we'll take that original and
14 make copies and return that original to you --
15 A. Great.
16 Q. -- next week.
17 (Exhibit Number 23 was marked.)
18 A. It's similar to Exhibit --
19 Q. (By Mr. Bush) 6?
20 A. No. 18. It's similar to Exhibit 18,
21 and it's dated July of 2006.
22 And this was a meeting that was actually
23 fairly significant in that it was a meeting between
24 Tariq Aziz, Scott Meece, and Michael Kehoe, the CEO.
25 And this was to request permission to spin out the

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<p>1 business.</p> <p>2 And what happened in that meeting was</p> <p>3 Michael actually said, "No, I don't want to spin it</p> <p>4 out, at least not yet. I'd like to give you a</p> <p>5 full-time job to work on it and what's the budget that</p> <p>6 you need?"</p> <p>7 And so that put -- that put it on a</p> <p>8 little bit different path. So the November document</p> <p>9 was really more of an extension of that. It made it</p> <p>10 more of an internal project, at least for a period of</p> <p>11 time.</p> <p>12 Q. And the November document to which you</p> <p>13 refer is what we marked as Exhibit 18, correct?</p> <p>14 A. That's correct.</p> <p>15 Q. So the meeting in July of 2006 that's</p> <p>16 the subject of Exhibit 23 resulted in a few more</p> <p>17 months of the whole EyeSite visual acuity kiosk being</p> <p>18 inside CIBA Vision? A little --</p> <p>19 A. It was supposed to be for a year at</p> <p>20 least, beginning in July -- of January of 2007. And</p> <p>21 on January, roughly, 6, 7, somewhere like that, after</p> <p>22 I came back, I was informed from the head of HR that</p> <p>23 the project was going to be cut because of a recall on</p> <p>24 a big contact lens product.</p> <p>25 Q. So you were informed -- who gave you the</p>	<p>1 would have been probably in the April or May time</p> <p>2 frame, I set up a dinner with Michael Kehoe. Prior to</p> <p>3 that is when -- and this is where I think it started</p> <p>4 to get into your question about when did I engage with</p> <p>5 Dr. Lavery. So my recollection would have been either</p> <p>6 late 2006 or certainly early 2007 and . . .</p> <p>7 Q. When you say early -- either late 2006</p> <p>8 or early 2007, you're describing --</p> <p>9 A. -- the first phone call.</p> <p>10 Q. -- the first phone call with Dr. Lavery?</p> <p>11 A. Yeah. And then the trip up to Jackson,</p> <p>12 Michigan, and we had a dinner at his country club. I</p> <p>13 don't recall the date of that, but it would have been</p> <p>14 obviously prior to Exhibit 22, which is the letter of</p> <p>15 intent with Dr. Lavery.</p> <p>16 So it would have been, you know, roughly</p> <p>17 a month or two ahead of that, so likely in the March,</p> <p>18 April time frame.</p> <p>19 Q. And tell me again the document we marked</p> <p>20 as Exhibit 23, how do you describe that document?</p> <p>21 Business recommendation?</p> <p>22 A. 23 is the business recommendation -- it</p> <p>23 was essentially the backup material that I used to try</p> <p>24 to convince the CEO that this was a business that we</p> <p>25 should spin out. And I -- and I essentially oversold</p>
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<p>1 report in early 2007?</p> <p>2 A. The head of HR. Her name was Michelle</p> <p>3 Prince.</p> <p>4 Q. And what did she report to you?</p> <p>5 A. That there had been a recall on a</p> <p>6 contact lens product and all noncritical spending was</p> <p>7 frozen. And then I had a choice to either go back</p> <p>8 into the North American sales team or -- actually, I</p> <p>9 think that was my only option.</p> <p>10 Q. That was your only option in early 2007?</p> <p>11 A. Correct.</p> <p>12 Q. And how did it come to be that after you</p> <p>13 were presented with that being your only option, in</p> <p>14 January of 2007, that then a few months later you came</p> <p>15 to form the separate company known as SoloHealth?</p> <p>16 A. So this is when -- and the timing is a</p> <p>17 little bit fuzzy, but it's all going to be in the same</p> <p>18 kind of eight months here, which is -- I remember</p> <p>19 talking to my father about this and how upset I was</p> <p>20 that I couldn't -- you know, I could have spun the</p> <p>21 company out earlier, and they gave me an opportunity</p> <p>22 to -- and I felt like I wasted a year.</p> <p>23 And what he said was, "Put your head</p> <p>24 down for 90 days and do exactly what they want you to</p> <p>25 do." And I did that. And after roughly 90 days, it</p>	<p>1 it because he said to his colleagues, "This is exactly</p> <p>2 the stuff we should be working on. I would prefer not</p> <p>3 to spin it out right now. Let's work on it a little</p> <p>4 bit more internally, and we'll give you the support."</p> <p>5 Q. And that -- that was the conversation</p> <p>6 that you described that took place in January of 2007?</p> <p>7 That they would give you the support to remain within</p> <p>8 CIBA Vision?</p> <p>9 A. No. That would have been -- that would</p> <p>10 have been this document -- this would have been -- so</p> <p>11 coming out of this meeting, July --</p> <p>12 Q. 2006?</p> <p>13 A. Yep. Coming out of that meeting, Scott</p> <p>14 Meece pulled me aside and said, "Hey, you know, even</p> <p>15 though Michael wants to move forward, it has to get</p> <p>16 approved by the budget committee. It's got to go</p> <p>17 through the budget process."</p> <p>18 And there was a meeting coming up at the</p> <p>19 end of September, I believe it was, September,</p> <p>20 October, where you will have the opportunity to</p> <p>21 present. He said, "Anything over \$750,000 has to get</p> <p>22 approved by that budget committee."</p> <p>23 And it's during that time frame that I</p> <p>24 decided that wouldn't it be beneficial to have a</p> <p>25 prototype built prior to that meeting, but I didn't</p>

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<p>1 have a budget.</p> <p>2 Q. Understood. Okay. Thank you for that</p> <p>3 clarification.</p> <p>4 And then you described a trip to</p> <p>5 Jackson, Michigan, to meet Dr. Lavery in person that</p> <p>6 took place, you believe, in April or May of 2007?</p> <p>7 A. That sounds right, yes.</p> <p>8 Q. And what was your reason for traveling</p> <p>9 to meet Dr. Lavery in person?</p> <p>10 A. I wanted to build rapport and I wanted</p> <p>11 him to understand what I was building and, I think,</p> <p>12 persuade him to assign his intellectual property over</p> <p>13 and be part of what I was building.</p> <p>14 Q. And when you say "persuade him to assign</p> <p>15 his intellectual property," you're referring to his</p> <p>16 patent?</p> <p>17 A. That's correct.</p> <p>18 Q. Are you referring to anything, other</p> <p>19 than his patent?</p> <p>20 A. No.</p> <p>21 Q. Tell me what you remember about that</p> <p>22 dinner meeting with Dr. Lavery that took place in</p> <p>23 Jackson, Michigan.</p> <p>24 A. It -- we were just -- you know, hit it</p> <p>25 off. We were friends, and it felt like he -- I think</p>	<p>1 A. Yes.</p> <p>2 Q. And the document we marked as Exhibit 24</p> <p>3 is on the first page, at least, labeled as a</p> <p>4 "Development plan" and an "IP Strategy."</p> <p>5 Do you see that?</p> <p>6 A. On page what? I'm sorry.</p> <p>7 Q. On the very first page.</p> <p>8 A. Correct.</p> <p>9 Q. And on page 5 with the heading "IP</p> <p>10 strategy"; do you see that?</p> <p>11 A. I do.</p> <p>12 Q. The first bullet point is "Agreements</p> <p>13 with CV and Lavery" --</p> <p>14 A. Yes.</p> <p>15 Q. -- do you see that?</p> <p>16 Can you describe what's being referenced</p> <p>17 by that phrase?</p> <p>18 A. That would be the assignment agreement</p> <p>19 with CIBA Vision and the Lavery either letter of</p> <p>20 intent or the assignment of the IP.</p> <p>21 Q. The assignment of Lavery's patent?</p> <p>22 A. Correct.</p> <p>23 Q. I'm going to give you a document we'll</p> <p>24 mark as 25.</p> <p>25 (Exhibit Number 25 was marked.)</p>
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<p>1 he was proud of what he had come up with. And he was</p> <p>2 surprised that a big company, being CIBA Vision, would</p> <p>3 be interested in what he had. And I had the</p> <p>4 impression that because it had just been sitting there</p> <p>5 and really no work had been done, this was a way to,</p> <p>6 at least, extract some value for what he had -- the</p> <p>7 initial light bulb moment or whatever he had years</p> <p>8 ago.</p> <p>9 Q. And following that dinner meeting, you</p> <p>10 came to prepare the letter of intent that we marked as</p> <p>11 Exhibit 22?</p> <p>12 A. Correct. There was -- yeah, that's</p> <p>13 correct.</p> <p>14 Q. Let's look at what we will mark as</p> <p>15 Exhibit 24.</p> <p>16 (Exhibit Number 24 was marked.)</p> <p>17 Q. (By Mr. Bush) Do you recognize the</p> <p>18 document we've marked as Exhibit 24, Mr. Foster?</p> <p>19 A. A little bit, but not -- I mean, not</p> <p>20 that familiar with it.</p> <p>21 Q. Does it appear to be a document that you</p> <p>22 drafted or do you remember?</p> <p>23 A. Likely.</p> <p>24 Q. You think it's likely that you created</p> <p>25 Exhibit 24?</p>	<p>1 Q. (By Mr. Bush) Do you recognize the</p> <p>2 document we've marked as Exhibit 25, Mr. Foster?</p> <p>3 A. Yes.</p> <p>4 Q. Can you identify Exhibit 25 for the</p> <p>5 record?</p> <p>6 A. It appears to be a document from</p> <p>7 Eyemaginations that says "Proof of Concept Kiosk</p> <p>8 Designs."</p> <p>9 Q. And what's referenced by these different</p> <p>10 Sit Down Number 1, Sit Down Number 2, all the way</p> <p>11 through Sit Down Number 3?</p> <p>12 A. These are different drawings that would</p> <p>13 be a kiosk or a booth that you would screen your</p> <p>14 vision, different options.</p> <p>15 Q. Different options. And at the point in</p> <p>16 time of the document we marked as Exhibit 25, you had</p> <p>17 not landed on a specific option?</p> <p>18 A. Correct. I'm not sure actually.</p> <p>19 Q. And what is it about what you're not</p> <p>20 sure?</p> <p>21 A. Well, you asked the question -- I don't</p> <p>22 know if the first part is -- it started to be built</p> <p>23 and these are options.</p> <p>24 Q. Understood. But this document we marked</p> <p>25 as Exhibit 25 came to you from Eyemaginations,</p>

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<p>1 correct?</p> <p>2 A. It appears so, yes.</p> <p>3 Q. Let's look at Exhibit 26.</p> <p>4 (Exhibit Number 26 was marked.)</p> <p>5 A. "Contribution Agreement"?</p> <p>6 Q. (By Mr. Bush) Yes, sir. Do you</p> <p>7 recognize the document we marked as Exhibit 26?</p> <p>8 A. Yes.</p> <p>9 Q. And the document we marked as Exhibit 26</p> <p>10 is the final agreement that was contemplated by the</p> <p>11 letter of intent we marked as Exhibit 22?</p> <p>12 A. Okay.</p> <p>13 Q. Is that correct?</p> <p>14 A. I would presume, yes.</p> <p>15 Q. And as you said earlier, your objective,</p> <p>16 in entering into the contribution agreement with</p> <p>17 Dr. Lavery, was to obtain an assignment of</p> <p>18 Dr. Lavery's patent?</p> <p>19 A. That's correct.</p> <p>20 Q. There's a reference to a closing at</p> <p>21 paragraph 1.1 on the first page. It says a closing</p> <p>22 shall take place at the offices of DLA Piper U.S. on</p> <p>23 West Peachtree Street in Atlanta.</p> <p>24 Do you see that?</p> <p>25 A. Yes.</p>	<p>1 Q. In connection with execution of this</p> <p>2 contribution agreements with Dr. Lavery, did you</p> <p>3 obtain any form of a method for developing and</p> <p>4 implementing the vision acuity kiosk?</p> <p>5 A. I don't recall.</p> <p>6 Q. In connection with executing this</p> <p>7 contribution agreement with Dr. Lavery, did you obtain</p> <p>8 any software from Dr. Lavery?</p> <p>9 A. No.</p> <p>10 Q. In connection with the execution of this</p> <p>11 contribution agreement, did Dr. Lavery request any</p> <p>12 confidentiality restrictions or nondisclosure</p> <p>13 restrictions?</p> <p>14 A. No. Not that wouldn't be already part</p> <p>15 of the agreement.</p> <p>16 Q. Understood.</p> <p>17 I want to look for a moment at what we</p> <p>18 will mark as Exhibit 27.</p> <p>19 (Exhibit Number 27 was marked.)</p> <p>20 Q. (By Mr. Bush) The document I've handed</p> <p>21 you that we've marked as Exhibit 27 is Dr. Lavery's</p> <p>22 lawsuit against Pursuant Health?</p> <p>23 A. Okay.</p> <p>24 Q. And I'll invite you to turn to</p> <p>25 paragraph 68. This is on page 14.</p>
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<p>1 Q. Did you personally attend a closing of</p> <p>2 this transaction?</p> <p>3 A. I don't recall.</p> <p>4 Q. And in connection with the execution of</p> <p>5 this contribution agreement, you obtained a patent</p> <p>6 assignment from Dr. Lavery, correct?</p> <p>7 A. Correct.</p> <p>8 Q. In connection with the execution of this</p> <p>9 contribution agreement, did you obtain anything else</p> <p>10 from Dr. Lavery, other than an assignment of the</p> <p>11 patent?</p> <p>12 A. I don't know.</p> <p>13 Q. Do you remember obtaining from</p> <p>14 Dr. Lavery at the time of the execution of this</p> <p>15 agreement anything other than a consulting agreement</p> <p>16 and a patent assignment?</p> <p>17 A. No.</p> <p>18 Q. In connection with execution of this</p> <p>19 contribution agreement, did you obtain a demonstration</p> <p>20 video from Dr. Lavery?</p> <p>21 A. I don't recall.</p> <p>22 Q. In connection with the execution of this</p> <p>23 contribution agreement with Dr. Lavery, did you obtain</p> <p>24 any form of a business model from Dr. Lavery?</p> <p>25 A. No.</p>	<p>1 A. Page 14, paragraph 68.</p> <p>2 Q. Yes. In the first sentence of</p> <p>3 paragraph 68 is Dr. Lavery's allegation that "The</p> <p>4 purpose of the contribution agreement was to enable</p> <p>5 Dr. Lavery to contribute certain intellectual property</p> <p>6 to SoloHealth so that SoloHealth could develop and</p> <p>7 distribute products under the patent in the form of a</p> <p>8 retinal scan kiosk."</p> <p>9 Do you see that?</p> <p>10 A. I do.</p> <p>11 Q. Do you have a view as to whether this</p> <p>12 allegation of Dr. Lavery is true or factually correct?</p> <p>13 A. I don't.</p> <p>14 Q. At the time of the execution of the</p> <p>15 contribution agreement, was SoloHealth planning to</p> <p>16 distribute products in the form of a retinal scan</p> <p>17 kiosk?</p> <p>18 A. No.</p> <p>19 Q. So --</p> <p>20 A. It's hard to --</p> <p>21 Q. Go ahead.</p> <p>22 A. If you put a timeline on it -- so, you</p> <p>23 know, if you said, Are you planning to do it in the</p> <p>24 next five years? Not sure. Planning to do it in the</p> <p>25 next two years? No. The next ten years? Possibly.</p>

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<p>1 Is that why we acquired the patent? No. But you</p> <p>2 could argue -- anyway, you get it.</p> <p>3 Q. Well, so your testimony is at the time</p> <p>4 of the contribution agreement, there was no intent to</p> <p>5 distribute products in the form of a retinal scan</p> <p>6 kiosk?</p> <p>7 A. I can't say either way.</p> <p>8 Q. Well, you told me earlier there was no</p> <p>9 plan to do it within two years of the contribution</p> <p>10 agreement; is that correct?</p> <p>11 A. Correct.</p> <p>12 Q. Look at paragraph 22 on page 5.</p> <p>13 A. Paragraph 22 on page 5. Okay.</p> <p>14 Q. And the second sentence says that</p> <p>15 Pursuant Health "kiosk is based on highly secret,</p> <p>16 proprietary information that Dr. Lavery developed and</p> <p>17 which is a valuable trade secret."</p> <p>18 Do you see that?</p> <p>19 A. I do.</p> <p>20 Q. Do you believe that allegation is</p> <p>21 factually accurate during the time period that you</p> <p>22 served as CEO of SoloHealth?</p> <p>23 A. No.</p> <p>24 Q. You believe this allegation is</p> <p>25 inaccurate?</p>	<p>1 executed in connection with the contribution</p> <p>2 agreement --</p> <p>3 A. Okay.</p> <p>4 Q. -- is that correct?</p> <p>5 A. I don't know.</p> <p>6 Q. Do you remember receiving an assignment</p> <p>7 of patent from Dr. Lavery --</p> <p>8 A. Yes.</p> <p>9 Q. -- in connection with the contribution</p> <p>10 agreement?</p> <p>11 A. Yes.</p> <p>12 Q. And your objective in entering into the</p> <p>13 contribution agreement was to obtain from Dr. Lavery a</p> <p>14 patent assignment, correct?</p> <p>15 A. Correct.</p> <p>16 Q. And Exhibit 28 reflects that patent --</p> <p>17 A. Correct.</p> <p>18 Q. -- assignment?</p> <p>19 A. Yes.</p> <p>20 Q. We've got to be careful not to talk over</p> <p>21 one another.</p> <p>22 I'm going to give you now a document</p> <p>23 we're going to mark as Exhibit 29.</p> <p>24 (Exhibit Number 29 was marked.)</p> <p>25 THE STENOGRAPHER: Give me a moment to</p>
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<p>1 A. The kiosk is based on highly secret,</p> <p>2 proprietary information that Dr. Kevin Lavery</p> <p>3 developed. That's not accurate.</p> <p>4 Q. And why is that not accurate?</p> <p>5 A. What did he develop? I just -- it would</p> <p>6 be more of a question. I don't know what that is.</p> <p>7 Q. But in any event, you don't agree that</p> <p>8 this allegation of paragraph 22 is true --</p> <p>9 A. No.</p> <p>10 Q. -- and correct. No?</p> <p>11 A. No.</p> <p>12 MR. BUSH: Is this Exhibit 26?</p> <p>13 THE STENOGRAPHER: 27, I believe.</p> <p>14 Can you look at the sticker on the</p> <p>15 front?</p> <p>16 THE DEPONENT: 27.</p> <p>17 MR. BUSH: Got it.</p> <p>18 This will be Exhibit 28.</p> <p>19 (Exhibit Number 28 was marked.)</p> <p>20 Q. (By Mr. Bush) I'll give you a moment to</p> <p>21 take a look at Exhibit 28.</p> <p>22 A. 28. "Assignment of Patent" dated</p> <p>23 October 11, 2007.</p> <p>24 Q. And Exhibit 28 is Dr. Lavery's</p> <p>25 assignment of his patent to SoloHealth that was</p>	<p>1 check who that is.</p> <p>2 Peter Krivkovich entered the room.</p> <p>3 MR. BUSH: Yes.</p> <p>4 THE DEPONENT: I've got to say hi.</p> <p>5 MR. BUSH: Can -- let's go off the</p> <p>6 record.</p> <p>7 THE DEPONENT: No. Don't go off the</p> <p>8 record. I'll say hey.</p> <p>9 Hey, Peter.</p> <p>10 MR. KRIVKOVICH: Hi, Bart. What's</p> <p>11 happening?</p> <p>12 THE DEPONENT: Hey, buddy. We're on the</p> <p>13 record.</p> <p>14 MR. KRIVKOVICH: On the record. I got</p> <p>15 it. I got it. Well, good to see you.</p> <p>16 THE DEPONENT: Good to see you too.</p> <p>17 MR. BUSH: Are we back on?</p> <p>18 THE VIDEOGRAPHER: Yes.</p> <p>19 Q. (By Mr. Bush) Looking at the document</p> <p>20 we marked as Exhibit 29, do you recognize this to be</p> <p>21 the consulting agreement that Dr. Lavery executed in</p> <p>22 connection with the contribution agreement?</p> <p>23 A. Yes.</p> <p>24 Q. And you remember Dr. Lavery executing a</p> <p>25 consulting agreement --</p>

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<p>1 A. Yes.</p> <p>2 Q. -- in connection with the contribution</p> <p>3 agreement?</p> <p>4 Can you describe what sorts of services</p> <p>5 or information Dr. Lavery provided to SoloHealth in</p> <p>6 connection with his performing the consulting</p> <p>7 agreement we've marked as Exhibit 29?</p> <p>8 A. Can you repeat the question?</p> <p>9 Q. Yeah. Can you remember what services or</p> <p>10 other information that Dr. Lavery might have provided</p> <p>11 to SoloHealth after execution of the consulting</p> <p>12 agreement and during Dr. Lavery's performance of the</p> <p>13 consulting agreement?</p> <p>14 A. Just likely general consultation, likely</p> <p>15 discussions around potential business model. Yeah.</p> <p>16 Q. You say likely he provided potential</p> <p>17 business model options?</p> <p>18 A. Correct.</p> <p>19 Q. Do you remember any specific business</p> <p>20 model options that he provided to SoloHealth in</p> <p>21 performing the consulting agreement?</p> <p>22 A. It would have been just a referral --</p> <p>23 you know, referral model or what doctors -- how</p> <p>24 doctors were -- ophthalmologists would, you know,</p> <p>25 perceive the units or potentially with the American</p>	<p>1 Peter, nice to meet you.</p> <p>2 MR. KRIVKOVICH: Nice to meet you.</p> <p>3 Q. (By Mr. Bush) Mr. Foster, you describe</p> <p>4 this referral model about -- from Dr. Lavery about</p> <p>5 what doctors -- what ophthalmologists would be</p> <p>6 thinking.</p> <p>7 Was this information provided to</p> <p>8 SoloHealth by Dr. Lavery in any tangible form?</p> <p>9 A. There may have been emails or -- but,</p> <p>10 no, I wouldn't think any documents of material</p> <p>11 importance.</p> <p>12 Q. Other than the referral model that</p> <p>13 you've described that Dr. Lavery might have provided</p> <p>14 to SoloHealth in connection with performing the</p> <p>15 consulting agreement, can you think of anything else</p> <p>16 that Dr. Lavery provided to SoloHealth in performing</p> <p>17 the consulting agreement?</p> <p>18 A. Potentially vendors to work with or</p> <p>19 consultants. Maybe things on the regulatory path or</p> <p>20 clinical validation, eye health information related to</p> <p>21 some of the content, perhaps, in a kiosk.</p> <p>22 Q. And all of these things that you</p> <p>23 described including this referral model, did</p> <p>24 Dr. Lavery characterize any of these things as trade</p> <p>25 secrets during that time period?</p>
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<p>1 Optometric Association, but nothing technical.</p> <p>2 MR. INOENCIO: Joel?</p> <p>3 MR. BUSH: Yes, sir.</p> <p>4 MR. INOENCIO: Before we go forward</p> <p>5 further, can we have Peter identify himself and his</p> <p>6 role?</p> <p>7 MR. BUSH: Yes. He's a board member of</p> <p>8 Pursuant Health. I'll let him introduce himself.</p> <p>9 MR. KRIVKOVICH: Yeah. Hi. Peter</p> <p>10 Krivkovich, board member of Pursuant Health, and I've</p> <p>11 been on the board for -- I forget the exact date, but</p> <p>12 for a while. Current all the way back to when Bart</p> <p>13 was operating CEO.</p> <p>14 MR. BUSH: And --</p> <p>15 MR. INOENCIO: Thank you. I just want</p> <p>16 the record to reflect that we had someone join the</p> <p>17 deposition and the person's role.</p> <p>18 Joel, are they -- is Peter appearing as</p> <p>19 the corporate representative today or . . .</p> <p>20 MR. BUSH: Peter is appearing as a</p> <p>21 corporate rep. John Jesser had to depart.</p> <p>22 MR. INOENCIO: Okay.</p> <p>23 MR. BUSH: And so Peter is in lieu of</p> <p>24 John Jesser's participation.</p> <p>25 MR. INOENCIO: Okay. Not a problem.</p>	<p>1 A. Not outside of what would be considered</p> <p>2 SoloHealth property.</p> <p>3 Q. And what do you mean by that?</p> <p>4 A. There was no mention of, "Hey, this is a</p> <p>5 trade secret that's mine," or anything like that. It</p> <p>6 was more we would just have conversations.</p> <p>7 Q. In other words, Dr. Lavery provided</p> <p>8 information to you, but he didn't label it as a trade</p> <p>9 secret?</p> <p>10 A. Correct.</p> <p>11 Q. Do you have a memory of Dr. Lavery</p> <p>12 providing any sort of demonstration video to</p> <p>13 SoloHealth in connection with his performing</p> <p>14 consulting services, under the consulting agreement we</p> <p>15 marked as Exhibit 29?</p> <p>16 A. What type of video?</p> <p>17 Q. Demonstration --</p> <p>18 A. I don't --</p> <p>19 Q. -- videos.</p> <p>20 A. A demonstration of what?</p> <p>21 Q. Dr. Lavery has alleged that he provided</p> <p>22 a demonstration video about the kiosk, and I'm asking</p> <p>23 whether you remember anything about a demonstration</p> <p>24 video prepared by Dr. Lavery that he provided to</p> <p>25 SoloHealth.</p>

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<p>1 A. I don't recall.</p> <p>2 Q. Dr. Lavery has also alleged that he</p> <p>3 provided a method to develop and expand the usage of</p> <p>4 the kiosk.</p> <p>5 Do you remember Dr. Lavery providing any</p> <p>6 kind of method for developing or implementing or</p> <p>7 expanding the usage of the kiosk, after the execution</p> <p>8 of the contribution agreement and in connection with</p> <p>9 his performing the consulting agreement?</p> <p>10 A. Yes.</p> <p>11 Q. And what do you remember about that?</p> <p>12 A. Just the importance of putting a retinal</p> <p>13 camera in the device. That was his -- that's what he</p> <p>14 wanted, and he thought it would really strengthen the</p> <p>15 business model.</p> <p>16 Q. Did you agree with his recommendation</p> <p>17 for putting a retinal camera into the device?</p> <p>18 A. I don't think I agreed nor disagreed.</p> <p>19 It was more of a timing and funding and priority.</p> <p>20 Q. After Dr. Lavery stressed to you the</p> <p>21 importance of putting a retinal camera into the device</p> <p>22 in connection with his performing the consulting</p> <p>23 agreement, did you take any steps to implement that</p> <p>24 idea provided by Dr. Lavery?</p> <p>25 A. It wouldn't have been until late -- you</p>	<p>1 implemented in the months following the execution of</p> <p>2 contribution agreement with Dr. Lavery and based on</p> <p>3 something you received --</p> <p>4 A. No.</p> <p>5 Q. -- from Dr. Lavery?</p> <p>6 A. In the months after, no. No. That</p> <p>7 prototype, everything was in motion.</p> <p>8 Q. Let's take a look at what we will mark</p> <p>9 as Exhibit 30.</p> <p>10 (Exhibit Number 30 was marked.)</p> <p>11 A. Oh, look at these, man.</p> <p>12 Q. (By Mr. Bush) And what are you looking</p> <p>13 at in Exhibit 30?</p> <p>14 A. Just old pictures and mock-ups I haven't</p> <p>15 seen in 20 years.</p> <p>16 Q. Can you --</p> <p>17 A. I wish you could see this, you guys.</p> <p>18 This is good stuff.</p> <p>19 Q. Can you identify Exhibit 30 for the</p> <p>20 record?</p> <p>21 A. It's Design Concepts October 18, 2007,</p> <p>22 Kiosk Information Systems, and there's little</p> <p>23 cardboard mock-ups and concepts and stuff.</p> <p>24 Q. Is this a document that you prepared,</p> <p>25 the one we marked as Exhibit 30?</p>
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<p>1 know, late 2013 probably, if I had to guess. It</p> <p>2 wasn't in the first five years.</p> <p>3 Q. And the idea of putting retinal cameras</p> <p>4 into the device, was that recommendation provided to</p> <p>5 you in any tangible form, or was this emails and</p> <p>6 informal conversations?</p> <p>7 THE STENOGRAPHER: Formal or informal?</p> <p>8 MR. BUSH: Informal.</p> <p>9 A. I would say the latter. There was</p> <p>10 likely some emails and some communication. I don't</p> <p>11 recall any documents that were produced.</p> <p>12 Q. (By Mr. Bush) After the execution of</p> <p>13 the contribution agreement, did you undertake to</p> <p>14 modify the kiosk as it had been developed?</p> <p>15 Did you undertake to modify it in any</p> <p>16 way in order to account for anything that you had</p> <p>17 received from Dr. Lavery?</p> <p>18 A. Possibly. Not sure.</p> <p>19 Q. And when you say "possibly," what are</p> <p>20 you potentially referring to?</p> <p>21 A. Well, we would talk frequently. And</p> <p>22 there was all kinds of things we talked about and</p> <p>23 ideas, so I can't be certain of that.</p> <p>24 Q. So sitting here today, can you identify</p> <p>25 any specific modification to the kiosk that was</p>	<p>1 A. No. Actually, it could be. It was --</p> <p>2 but the pictures would have come from -- yeah. Sorry.</p> <p>3 It is a document I likely put together. Kiosk</p> <p>4 Information Systems -- bear with me a second.</p> <p>5 No. This is -- I don't know who put</p> <p>6 this together actually. But the -- it's basically</p> <p>7 describing various mockups from the RFP that we</p> <p>8 received. So some of these are NCR. The cardboard</p> <p>9 ones are MAYA Design. Concept 3 is NCR. Concept 4 is</p> <p>10 likely the Panaseca kiosk. And the current version</p> <p>11 without the scan is Kiosk Information Systems, which</p> <p>12 has already been depicted in a prior --</p> <p>13 Q. The last page, this says "Current</p> <p>14 version without the skin."</p> <p>15 A. Correct.</p> <p>16 Q. That's just -- that's a picture of the</p> <p>17 prototype --</p> <p>18 A. Correct.</p> <p>19 Q. -- we've been talking about, correct?</p> <p>20 A. Correct.</p> <p>21 Q. Do any of the concepts that are depicted</p> <p>22 in the photographs in Exhibit 30 reflect any of the</p> <p>23 ideas from Dr. Lavery?</p> <p>24 A. No.</p> <p>25 Q. Now, you talked earlier about Dr. Lavery</p>

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1 stressing the importance of putting a retinal camera
2 into the device.
3 A. Uh-huh.
4 Q. Did Dr. Lavery characterize that idea on
5 his part as a trade secret?
6 A. No.
7 Q. From your perspective, did Dr. Lavery's
8 recommendation of putting a retinal camera into the
9 device, was that a follow-on idea from the ideas
10 embedded in his patent?
11 A. Likely.
12 Q. Do you remember at any time Dr. Lavery
13 characterizing anything at all to you as a trade
14 secret that was owned by Dr. Lavery?
15 A. I'm not sure.
16 Q. Do you remember either way --
17 A. No.
18 Q. -- Dr. Lavery using the word "trade
19 secret" in his communications --
20 A. I'm sure --
21 Q. -- with you?
22 A. -- he used that word, yes. But in what
23 context, I have no idea.
24 Q. Let's look at 31.
25 (Exhibit Number 31 was marked.)

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1 Q. (By Mr. Bush) Mr. Foster, do you
2 recognize the document we marked as Exhibit 31?
3 A. Yeah.
4 Q. Can you identify it for the record?
5 A. This is the "Design and Development
6 Kickoff meeting," October 29, 2007. And the
7 participants include myself, Nick McManus, and John
8 Crowley of MAYA design and Stephen Kendig.
9 Q. And who was Stephen Kendig?
10 A. At the time he would have been a
11 director -- like a project manager. But he was the --
12 yeah, one of the first employees.
13 Q. And Stephen Kendig came over to
14 SoloHealth from CIBA Vision?
15 A. Correct.
16 Q. Did Dr. Lavery participate in this
17 meeting that is reflected in Exhibit 31?
18 A. It doesn't appear so.
19 Q. I'll give you a document we'll mark as
20 Exhibit 32.
21 (Exhibit Number 32 was marked.)
22 A. Man, you guys got all of it. This is
23 good.
24 Q. (By Mr. Bush) Do you recognize the
25 document we've marked as Exhibit 32, Mr. Foster?

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1 A. Sort of.
2 Q. Can you identify Exhibit 32 --
3 A. "SoloHealth --
4 Q. -- for the record?
5 A. -- Advisory Board, February 1, 2008."
6 Q. Did you prepare the document that we've
7 marked as Exhibit 32?
8 A. Yes.
9 Q. And what was your objective in preparing
10 Exhibit 32?
11 A. I don't know.
12 Q. Let's look at what is marked as page 9
13 of Exhibit 32. Top page says "EyeSite Printed
14 Results."
15 A. Yes.
16 Q. And this is another photographic
17 depiction of the vision test report template?
18 A. Correct.
19 Q. And beginning on page 13, there's a
20 slide that says "Business Model." And there are
21 several pages of text, depictions, graphics,
22 information describing the business model.
23 Do you see that?
24 A. I do.
25 Q. And from your perspective, what

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1 information is being conveyed in these pages about the
2 SoloHealth business model as of February 2008?
3 A. How if you can educate people on the
4 importance of eye health and visual acuity needs, that
5 you can grow the overall market and drive revenue.
6 Q. And this -- these are business model
7 concepts for SoloHealth that you prepared?
8 A. That's correct.
9 Q. Did anybody assist you in your
10 preparation of this business model planning --
11 A. Many.
12 Q. -- for SoloHealth?
13 A. Many.
14 Q. And who helped you?
15 A. Stephen Kendig, maybe Peter Krivkovich,
16 I don't know. You know, whoever the advisory board
17 members were. There's a guy, Gary Gerber, some of the
18 early investors likely. Yeah. It was very
19 collaborative. Just asked a lot of questions, so I'm
20 sure there were many people that provided input.
21 Q. Did Dr. Lavery provide input to you in
22 his performing his responsibilities under the
23 consulting agreement?
24 A. Yeah. Likely.
25 Q. Do you remember any specific

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1 contributions from Dr. Lavery in connection with his
2 performance of the consulting agreement?
3 A. Not specific. It might have been market
4 size or how many ophthalmologists there were or an
5 ophthalmologist's role versus an optometrist's role,
6 things like that.
7 Q. I'll give you a document we've marked as
8 Exhibit 33.
9 (Exhibit Number 33 was marked.)
10 Q. (By Mr. Bush) Do you recognize the
11 document we've marked as Exhibit 33, Mr. Foster?
12 A. I do.
13 Q. And can you identify Exhibit 33 for the
14 record?
15 A. It's a thank you note to Andrea Saia,
16 who was current CEO of CIBA Vision on April 14 of
17 2008.
18 Q. And what was your reasoning in sending
19 this thank you note to Andrea Saia?
20 A. To build rapport so we could get the IP
21 signed over from CIBA Vision.
22 Q. Do you remember when you received the IP
23 from CIBA Vision?
24 A. I don't.
25 Q. And you're referring to the patent --

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1 A. Correct.
2 Q. -- owned by CIBA Vision for which you
3 were the named inventor --
4 A. Correct.
5 Q. -- correct?
6 A. There was a document of when that was
7 signed over. I just don't know the date.
8 This is so good. Did you get this from
9 her?
10 Q. That's from SoloHealth files.
11 A. I would have copied this?
12 Q. If you want to look at Exhibit 21 that
13 we marked earlier today.
14 A. Okay. Yes.
15 Q. And Exhibit 21 reflects the assignment
16 of the patent from CIBA Vision on August 20 of 2007,
17 correct?
18 A. Yes.
19 Q. Does that refresh your recollection as
20 to the date of the patent assignment in favor of
21 SoloHealth from CIBA Vision?
22 A. No. It's hard to say. So the -- can
23 I -- I'll just talk freely, and then you can --
24 Q. Go ahead.
25 A. -- put the dates together.

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1 Q. That's fair. Go ahead.
2 A. So the patent was -- you know, I left
3 October 1.
4 Q. 2007?
5 A. Correct. The agreement stipulated that
6 I had to raise \$1.5 million within six months for the
7 patent to be signed over.
8 And I raised that amount, of which Peter
9 Krivkovich and his family were part of that initial
10 seed round. And one of the investors asked questions
11 about the IP and when they did diligence, they
12 realized that the IP wasn't signed over until we
13 raised that money. So they chose to have an escrow
14 agreement that essentially said that their money would
15 go into escrow until which time that the CIBA Vision
16 IP was signed over.
17 In that process, Michael Kehoe, who made
18 the original agreement, who was the CEO of CIBA
19 Vision, got let go. Andrea Saia, who was the chief
20 marketing officer, assumed the CEO responsibility.
21 Andrea learned of Stephen Kendig coming
22 over to join and -- yeah. I'll pause there. I'm --
23 the -- I guess the part that I would say that you
24 could find the dates, but it was quite a bit -- it was
25 after we had already raised the capital, but it took

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1 another considerable while to get the IP signed over.
2 Because what happened -- CIBA Vision actually didn't
3 have the authority -- it wasn't their IP. It was
4 Novartis'.
5 Q. In other words, the patent for which you
6 were the named inventor that was filed in 2004 is a --
7 was a patent at that point in time that was owned by
8 Novartis, not CIBA Vision?
9 A. Correct.
10 Q. Is that your testimony?
11 A. CIBA Vision was the parent company of
12 Novartis.
13 Q. CIBA was the parent of Novartis, or was
14 it the other way around?
15 A. No. Sorry. Novartis was the parent of
16 CIBA Vision. And so because of that, Novartis had to
17 approve the IP transfer.
18 Q. And that took some time?
19 A. Yeah.
20 Q. Okay. Understood. All right. Thank
21 you for that clarification.
22 Let's move to Exhibit 33.
23 THE STENOGRAPHER: I believe this is 34.
24 MR. INOENCIO: 34.
25 MR. BUSH: 34. Thank you.

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1 (Exhibit Number 34 was marked.)
2 Q. (By Mr. Bush) Do you recognize the
3 document we've marked as Exhibit 34?
4 A. I do.
5 Q. Can you identify it for the record?
6 A. It's an article in Forbes titled:
7 "SoloHealth Wins Three Awards, Including 'Best in
8 Show' for EyeSite Innovation at KioskCom Expo."
9 Q. And what's the date of these awards
10 being handed out in favor of SoloHealth?
11 A. It was the date of -- the article is
12 April 17 of 2008.
13 Q. And does this document, we've marked as
14 Exhibit 34, refresh your recollection as to the timing
15 of the first public deployments of the vision acuity
16 kiosk, the EyeSite kiosk?
17 A. It would have been around the same time.
18 Q. So sometime in the first quarter of
19 2008, the EyeSite kiosk began to be placed in public
20 retail locations for consumer use?
21 A. Correct.
22 Q. And the photograph that is included in
23 Exhibit 34 is a photograph of yourself and Stephen
24 Kendig with the EyeSite kiosk?
25 A. That's correct.

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1 Q. Is there anything from Dr. Lavery that
2 is reflected in this version of the kiosk that is in
3 the photograph in Exhibit 34?
4 A. No.
5 Q. We're going to look at Exhibit 35.
6 (Exhibit Number 35 was marked.)
7 Q. (By Mr. Bush) Do you recognize the
8 document we've marked as Exhibit 35, Mr. Foster?
9 A. I do.
10 Q. Can you identify it for the record?
11 A. It's the CNBC article entitled: "First
12 EyeSite Kiosk Debuts in Georgia Walmart" dated 26th of
13 June 2008.
14 Q. Does Exhibit 35 refresh your
15 recollection as to the date of the first public
16 EyeSite kiosk in a public retail location?
17 A. It would have been Q2 of 2008.
18 Q. And that's at a Walmart in Cumming,
19 Georgia, correct?
20 A. That's correct.
21 Q. And there's a photograph of the kiosk on
22 Exhibit 35, correct?
23 A. Yes.
24 Q. Does that kiosk reflect any ideas or
25 contributions from Dr. Lavery?

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1 A. I'm not sure.
2 Q. Is there any difference between the
3 kiosk that's reflected in Exhibit 35 from the kiosk
4 that's reflected in Exhibit 34?
5 A. Yes.
6 Q. And what are the differences?
7 A. The modular design, the hardware is
8 different. The -- actually, let me think.
9 No. Maybe -- it could be the same
10 actually.
11 Q. I perceive them to be the same. That's
12 why I asked the question.
13 A. Yeah. No. That's fair. It's been
14 20 years. Yeah. I think they're the same. We made
15 five, and they were all made by Kiosk Information
16 Systems. One went to the show so we could win those
17 awards. That one's in Cumming, Georgia.
18 Q. The one that went to the show?
19 A. No. I think it was a different one.
20 That one has an adjustable seat. I don't know if the
21 one in the show did or not.
22 Q. The one that went to Cumming, Georgia
23 went to the Walmart, right?
24 A. Correct.
25 Q. And then where did the other three go?

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1 A. I'm not sure.
2 Q. You don't remember?
3 A. Well, eventually we had five -- in 2008
4 we had five -- roughly five in Walmarts in and around
5 Georgia -- in and around Atlanta.
6 Q. And looking at the third paragraph of
7 the press article in Exhibit 35, there's a statement
8 that "The EyeSite kiosk is the brainchild of Atlanta
9 entrepreneur Bart Foster."
10 Do you see that?
11 A. Correct.
12 Q. Is that a true and correct statement?
13 A. Yes.
14 Q. This will be 36.
15 (Exhibit Number 36 was marked.)
16 Q. (By Mr. Bush) I'll give you a moment,
17 Dr. -- I'm sorry -- Mr. Foster to look at Exhibit 36.
18 A. Got it.
19 Q. Are you able to identify -- do you
20 recognize Exhibit 36?
21 A. It's dated September 2 of 2008,
22 "Software Architecture Meeting."
23 Q. Did you prepare the document we've
24 marked as Exhibit 36?
25 A. No.

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<p>1 Q. Have you seen Exhibit 36 before today?</p> <p>2 A. Yes.</p> <p>3 Q. Do you know why it was prepared?</p> <p>4 A. I don't.</p> <p>5 Q. And looking through what we've marked as</p> <p>6 Exhibit 36, this appears to reflect the current status</p> <p>7 of the software, perhaps some bug fixes, and version</p> <p>8 updates to the software in the kiosk as of</p> <p>9 September 2008; is that correct?</p> <p>10 A. It appears so, yes.</p> <p>11 Q. And who all was involved in the software</p> <p>12 architecture upgrades at the point in time of the</p> <p>13 document we've marked as Exhibit 36?</p> <p>14 A. Stephen Kendig and potentially Eric</p> <p>15 Hoel, spelled O -- sorry -- H-o-e-l.</p> <p>16 Q. Any others that you can remember?</p> <p>17 A. I'm not aware. There -- I'm sure there</p> <p>18 were -- if there was, I'm not sure.</p> <p>19 Q. Was Dr. Lavery ever involved in software</p> <p>20 architecture meetings to your knowledge?</p> <p>21 A. No.</p> <p>22 Q. Let's look at Exhibit 37.</p> <p>23 (Exhibit Number 37 was marked.)</p> <p>24 Q. (By Mr. Bush) Do you recognize</p> <p>25 Exhibit 37, Mr. Foster?</p>	<p>1 Q. And what is this document?</p> <p>2 A. It's a "Patent Update" likely intended</p> <p>3 for investors.</p> <p>4 Q. And this document -- dated October 23,</p> <p>5 2008, correct?</p> <p>6 A. Correct.</p> <p>7 Q. And it describes SoloHealth as having</p> <p>8 two main intellectual property assets, correct?</p> <p>9 A. That's correct.</p> <p>10 Q. And the first is the Lavery patent and</p> <p>11 the second is the Foster patent?</p> <p>12 A. That's correct.</p> <p>13 Q. This will be 39.</p> <p>14 (Exhibit Number 39 was marked.)</p> <p>15 Q. (By Mr. Bush) Do you recognize</p> <p>16 Exhibit 39, Mr. Foster?</p> <p>17 A. Yes.</p> <p>18 Q. And this is a continuation to your</p> <p>19 original patent that was filed in 2004, correct?</p> <p>20 A. Correct.</p> <p>21 Q. And the continuation that's embedded in</p> <p>22 Exhibit 39 was filed in February of 2009, correct?</p> <p>23 A. That's correct.</p> <p>24 Q. And the patent that's marked as</p> <p>25 Exhibit 39 ultimately issued in May of 2012, correct?</p>
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<p>1 A. No.</p> <p>2 Q. Do you believe you've seen this document</p> <p>3 before today?</p> <p>4 A. Yes.</p> <p>5 Q. And this document itemizes the</p> <p>6 SoloHealth Intellectual Property, correct?</p> <p>7 A. It appears so, yes.</p> <p>8 Q. Do you remember any intellectual</p> <p>9 property owned by SoloHealth that's not reflected in</p> <p>10 the descriptive information on Exhibit 37?</p> <p>11 A. Can you repeat that?</p> <p>12 Q. Do you remember any intellectual</p> <p>13 property owned by SoloHealth in the 2008 time period</p> <p>14 that's not reflected in this description information</p> <p>15 and information on Exhibit 37?</p> <p>16 A. No.</p> <p>17 Q. To your knowledge, Exhibit 37 is a true</p> <p>18 and complete listing of the intellectual property</p> <p>19 owned by SoloHealth in 2008?</p> <p>20 A. Yes.</p> <p>21 Q. 38.</p> <p>22 (Exhibit Number 38 was marked.)</p> <p>23 Q. (By Mr. Bush) Do you recognize</p> <p>24 Exhibit 38, Mr. Foster?</p> <p>25 A. I do.</p>	<p>1 A. Correct.</p> <p>2 Q. And you are the named inventor for the</p> <p>3 patent in the claims that are reflected --</p> <p>4 A. Correct.</p> <p>5 Q. -- in Exhibit 39, correct?</p> <p>6 A. Yes.</p> <p>7 Q. This will be 40.</p> <p>8 (Exhibit Number 40 was marked.)</p> <p>9 Q. (By Mr. Bush) Do you recognize the</p> <p>10 document we've marked as Exhibit 40?</p> <p>11 A. When you say "do you recognize," I'm not</p> <p>12 sure what you mean.</p> <p>13 Q. Have you ever seen the document we've</p> <p>14 marked as Exhibit 40 before today?</p> <p>15 A. I'm sure at some point.</p> <p>16 Q. Are you able to identify the document</p> <p>17 we've marked as Exhibit 40?</p> <p>18 A. It appears to be a document written by</p> <p>19 Stephen Kendig April 23, 2009.</p> <p>20 Q. And looking at the third page, it's got</p> <p>21 a 3 in the bottom right, it describes the "SoloHealth</p> <p>22 Overview"?</p> <p>23 A. Page 3?</p> <p>24 Q. Page 3.</p> <p>25 A. Yep.</p>

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1 Q. With a reference to the 1.8 million in
2 seed capital --
3 A. Correct.
4 Q. -- that you testified about earlier --
5 A. Yeah.
6 Q. -- correct?
7 And on page 5 is the version of the
8 EyeSite kiosk as of April of 2009, correct?
9 A. Correct.
10 Q. And there's a photographic depiction of
11 the kiosk as of April 2009, correct?
12 A. Yes.
13 Q. Does that version of the kiosk include
14 any intellectual property or ideas of Dr. Kevin
15 Lavery?
16 A. I don't know.
17 Q. And why is it you can't give a clear
18 answer to that?
19 A. I think I did give a clear answer.
20 Q. Well, do you remember Dr. Lavery
21 providing any information to you that you used to
22 modify the kiosk --
23 A. I don't know.
24 Q. -- in or around early 2009?
25 A. I don't think so. I don't know.

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1 Q. When you say "I don't know," is it that
2 you don't remember making a modification to the kiosk
3 to account for any information from Dr. Lavery?
4 A. Yeah.
5 MR. INOENCIO: I'm going to object.
6 You're assuming the fact that it would have had to
7 have been modified at some point to include
8 information from Dr. Lavery.
9 And he's already testified he doesn't
10 know.
11 MR. BUSH: I'm asking whether he
12 remembers, but your objection is noted.
13 Q. (By Mr. Bush) Do you remember,
14 Mr. Foster, making any modifications to the kiosk in
15 late 2008 or early 2009 --
16 A. There were -- there were a ton of
17 modifications made.
18 Q. I need to finish my question so that our
19 record is clear, and I apologize for that.
20 And I'm asking specifically for your
21 memory about any modifications to the kiosk,
22 specifically to incorporate any information received
23 from Dr. Lavery.
24 Do you have a memory of making any
25 modifications to the kiosk in late 2008 or early 2009

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1 as a consequence of any information received --
2 A. Yeah.
3 Q. -- from Dr. Lavery?
4 A. Absolutely.
5 Q. What did you do?
6 A. I have no idea.
7 Q. You believe you made modifications based
8 on information from Dr. Lavery, but you don't know
9 what you did?
10 A. Correct.
11 Q. How is it that you remember doing it,
12 and you can't describe what you did?
13 A. It's real easy. I bet we made 100
14 little modifications. And it could have been
15 everything from change the button from green to
16 orange. It could have been make sure the sign is --
17 says free. Modify the hardware this way.
18 Dr. Lavery and I would talk sometimes
19 every couple weeks; sometimes a couple months would go
20 by. I didn't take detailed notes of who said what.
21 We were just moving. We were moving fast. So I can't
22 clearly determine who said what and what modifications
23 were made.
24 Q. Understood. That's fair.
25 And these conversations that you

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1 describe that you remember having with Dr. Lavery in
2 which he made -- he gave information to you, these are
3 conversations that took place in connection with
4 Dr. Lavery's performance of the consulting agreement;
5 is that correct?
6 A. Yeah.
7 Could I get copies of all this stuff,
8 Joel?
9 Q. Sure. Not a problem.
10 A. I like the color ones.
11 Q. All right.
12 MR. INOENCIO: Can I just say I wish
13 every witness was this enthusiastic about being in a
14 deposition.
15 THE DEPONENT: Dude, it's something I
16 invented 20 years ago, and it's like --
17 MR. INOENCIO: I get it. I get it.
18 THE DEPONENT: It's crazy, man. Like,
19 you should see this shit. It's like 20 years ago. We
20 were 15 years too early. This shit still should be
21 out there right now.
22 MR. INOENCIO: I agree with you. It
23 should be.
24 THE DEPONENT: It will be. It's just we
25 were too early.

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1 Q. (By Mr. Bush) Mr. Foster, while you
2 served as the CEO at SoloHealth, did the company
3 generate revenue from the optical or vision
4 functionality of the kiosk?
5 A. Yes.
6 Q. And while you served as CEO at
7 SoloHealth, was Dr. Lavery always paid a 1 percent
8 royalty based on total revenue?
9 A. I don't recall.
10 Q. From your perspective and while you were
11 employed as the CEO of SoloHealth, did the company
12 derive any profits from practicing any of the ideas in
13 Dr. Lavery's patent?
14 A. Indirectly.
15 Q. And how is that the case?
16 A. Well, because his patent was written so
17 broadly it covered -- it was -- it was just assumed
18 that, you know, it's part of our intellectual
19 property. So we never -- we never said, oh, that's
20 covered by that patent, or this is covered by this
21 patent. It's just -- it's owned by SoloHealth, so it
22 doesn't matter. We just kept moving.
23 Q. How would you describe the profitability
24 of SoloHealth while you served as the CEO?
25 A. Can you be more specific?

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1 Q. I'm just looking for your description of
2 the profitability of the company, the financial state
3 of the company, during the time period that you served
4 as CEO?
5 MR. INOENCIO: Objection. Compound.
6 Q. (By Mr. Bush) Was the company
7 profitable during the time period --
8 A. Yeah.
9 Q. -- that you served as CEO?
10 Were there time periods during your
11 service of CEO during which the company was unable to
12 make payroll?
13 A. No. We were damn close a lot of times,
14 but we never missed a payroll.
15 Q. And when did you separate from
16 SoloHealth?
17 A. 2014.
18 Q. And what were the circumstances of your
19 separation from SoloHealth?
20 A. Say that again.
21 Q. What were the circumstances -- what were
22 the reasons for your separation from SoloHealth?
23 A. Peter told me I had to go. No. Don't
24 put that on the record. Sorry. I mean, that was
25 maybe part of it, but it's -- I needed some levity

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1 there.
2 The circumstances -- I'm not sure what
3 you're looking for.
4 Q. The reasons you came to no longer be
5 employed at SoloHealth.
6 Did it have anything to do with
7 Dr. Lavery's intellectual property --
8 A. No.
9 Q. -- or patent?
10 A. No.
11 MR. BUSH: I have no further questions
12 at this time. I've got a couple of additional
13 documents in my room that I'll come back to, but I'll
14 stop here, Bruce.
15 MR. INOENCIO: Okay. Can we take about
16 a ten-minute break so I can kind of go through my
17 notes and see what questions I was planning to ask
18 that you've already covered?
19 MR. BUSH: Sure.
20 MR. INOENCIO: I just want to be more
21 efficient.
22 THE VIDEOGRAPHER: We are going off the
23 video record at 3:10 p.m.
24 (Recess from 3:10 p.m. to 3:22 p.m.)
25 THE VIDEOGRAPHER: We are back on the

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1 video record at 3:22 p.m.
2 EXAMINATION
3 BY MR. INOENCIO:
4 Q. Mr. Foster, you know that I'm the
5 attorney for Kevin Lavery, correct?
6 A. Correct.
7 Q. And do you recall speaking to me
8 approximately one year ago relative to this case?
9 A. Yes.
10 Q. Before the lawsuit was filed, right?
11 A. I don't know when the lawsuit was filed.
12 Q. Okay. But you do recall speaking to me
13 one time prior to today on the phone, right?
14 A. Correct.
15 Q. And we have not spoken since?
16 A. No.
17 Q. Can you tell me what you did to prepare
18 for your deposition today, if anything?
19 A. I found my -- I found two documents last
20 night, which were Exhibit 23 and Exhibit 6 that I
21 brought with me today. And I looked through a hard
22 drive to see if I had anything else that was relevant,
23 and that was 7:00 a.m. this morning. And that's it.
24 Q. Did you have any discussions with either
25 Joel Bush or Ben Richardson or Steve Susser, counsel

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<p>1 for Pursuant Health, prior to your deposition?</p> <p>2 A. Pause a second. I'm just trying to get</p> <p>3 a mic hooked up.</p> <p>4 THE DEPONENT: This one?</p> <p>5 Is that all right? You got it? Okay.</p> <p>6 Cool.</p> <p>7 A. Will you say that again? Sorry, Bruce.</p> <p>8 Q. (By Mr. Inosencio) Sure. Prior to your</p> <p>9 deposition, did you have any discussions with either</p> <p>10 Joel Bush, who was taking your deposition today on</p> <p>11 behalf of the company, or his associate Ben Richardson</p> <p>12 or their local co-counsel Steve Susser, relative to</p> <p>13 the topics that would be addressed in the deposition</p> <p>14 today?</p> <p>15 A. Limited.</p> <p>16 Q. When did you first speak with them?</p> <p>17 A. I want to -- you know, I think Joel may</p> <p>18 have reached out three months ago to schedule this</p> <p>19 meeting. It could have been November. Ben Richardson</p> <p>20 doesn't ring a bell. There might have been some email</p> <p>21 correspondence.</p> <p>22 And who was the other person?</p> <p>23 Q. Steve Susser.</p> <p>24 A. That doesn't -- name doesn't ring a</p> <p>25 bell.</p>	<p>1 Q. Did he send you any documents to review?</p> <p>2 A. Not that I'm aware, except that subpoena</p> <p>3 that was delivered.</p> <p>4 Q. But no documents to get your input on,</p> <p>5 correct?</p> <p>6 A. Correct.</p> <p>7 Q. Were there any documents that you wanted</p> <p>8 to see, prior to your deposition today, that you</p> <p>9 either could not find or you asked for and you were</p> <p>10 denied access to?</p> <p>11 A. No.</p> <p>12 Q. Did anyone tell you what topics would be</p> <p>13 discussed in your deposition today, prior to the</p> <p>14 deposition starting?</p> <p>15 A. I don't think so, no.</p> <p>16 Q. I'm going to have you take a look at</p> <p>17 Exhibit 21. That's the document that you showed me,</p> <p>18 and I took a screenshot of. If you could pull that up</p> <p>19 and take a look at it.</p> <p>20 A. Yep. Got it.</p> <p>21 Q. Thank you. So I'm looking at the</p> <p>22 document, and in the fourth row it says "Develop full</p> <p>23 project plan, including timeline resources, budget,</p> <p>24 et cetera," correct?</p> <p>25 A. Correct.</p>
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<p>1 Q. How many telephone conferences did you</p> <p>2 have with Mr. Bush prior to your deposition today?</p> <p>3 A. Two.</p> <p>4 Q. And when were those?</p> <p>5 A. One was probably November, and one was</p> <p>6 last night.</p> <p>7 Q. And how long did you speak with Mr. Bush</p> <p>8 approximately the first time you spoke with him back</p> <p>9 in November?</p> <p>10 A. Six minutes.</p> <p>11 Q. That seems like a pretty specific</p> <p>12 answer. How do you know it was six minutes?</p> <p>13 A. Because you gave me the opportunity to</p> <p>14 say approximately.</p> <p>15 Q. Good response.</p> <p>16 So do you know specifically how much it</p> <p>17 was, how long it was?</p> <p>18 A. No.</p> <p>19 Q. Okay. What about your call with</p> <p>20 Mr. Bush last night. Approximately, how long did you</p> <p>21 speak with Mr. Bush?</p> <p>22 A. Four minutes.</p> <p>23 Q. Okay. Did you share any documents with</p> <p>24 Mr. Bush via email in the last three months?</p> <p>25 A. I did not.</p>	<p>1 Q. Does that date -- it's a little fuzzy on</p> <p>2 my end, but does that date say July 30, 2007?</p> <p>3 A. It does.</p> <p>4 Q. And that's shortly after you signed the</p> <p>5 letter of intent with Dr. Lavery, correct?</p> <p>6 A. That date is shortly after I signed the</p> <p>7 agreement, correct.</p> <p>8 Q. Do you have the letter of intent there</p> <p>9 in front of you? Could you pull that back up?</p> <p>10 A. Which exhibit was that?</p> <p>11 MR. BUSH: It's 22.</p> <p>12 Q. (By Mr. Inosencio) 22.</p> <p>13 A. If I would have kept these in order,</p> <p>14 we'd be good.</p> <p>15 Q. I get it.</p> <p>16 A. Sorry. Hold on.</p> <p>17 Q. Not a problem. Take your time.</p> <p>18 THE DEPONENT: Can I get the</p> <p>19 videographer to help me? Can you help organize these</p> <p>20 back in -- the number? That would be awesome.</p> <p>21 A. We're looking for 22?</p> <p>22 Q. (By Mr. Inosencio) Yes, please.</p> <p>23 MR. BUSH: It's this one.</p> <p>24 Q. (By Mr. Inosencio) It's the letter of</p> <p>25 intent that says draft July -- or June 5, 2007, in the</p>

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1 upper right-hand corner.
2 A. Yeah. He found it.
3 THE DEPONENT: All right. Thank you.
4 Q. (By Mr. Inosencio) Okay. Great.
5 THE DEPONENT: Here's the -- thanks. I
6 appreciate your help.
7 A. Got it.
8 Q. (By Mr. Inosencio) Thank you.
9 A. Okay.
10 Q. So in this document, this was a document
11 that you prepared, correct?
12 A. Either me or my attorneys, but yes.
13 Q. In looking at --
14 A. With consultation from Dr. Lavery, it
15 took several iterations, I believe.
16 Q. So in the letter of intent, there's no
17 reference here to the leverage that you were hoping to
18 gain with CIBA Vision, correct?
19 A. There's no mention of anything like
20 that, no.
21 Q. And you also testified earlier today
22 that there was leverage that you were hoping to gain
23 through this process with Dr. Lavery regarding another
24 entity, if I remember correctly; is that correct?
25 A. I don't recall that. What was that?

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1 Another entity?
2 Q. You testified -- and maybe my notes are
3 incorrect. But you testified that as part of your
4 efforts to engage Dr. Lavery that you were hoping that
5 this would provide leverage.
6 And I thought you said that there was
7 leverage that you were hoping to obtain relative to
8 CIBA Vision. I thought you said there was some other
9 aspect of the leverage. Am I --
10 A. So --
11 Q. -- remembering that correctly?
12 A. So shortly after -- so in January of
13 2007, I was informed that -- in which point I just
14 started my new job, I was informed that -- shortly
15 thereafter that my project had gotten cut, and it was
16 on hold, basically, indefinitely.
17 And during that time I started working
18 on the business plan in earnest and also was flying
19 around the country trying to help CIBA Vision.
20 And it was at that time that I met
21 Dr. Lavery. And my intention was, if we could do an
22 agreement, I could go back to CIBA Vision and -- with
23 an issued patent and say, Look, I'm going to go do
24 this with this issued patent. CIBA Vision, I would
25 love you to be part of this. You contribute your

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1 patent also, and that's what happened.
2 Q. Okay. And the reason I ask the question
3 is because I don't want it to come across in the
4 record as though your use of the word "leverage" had
5 some type of nefarious or underhanded meaning. That's
6 what I was trying to understand, because that's not
7 how I took it, and I wanted to make sure that the
8 record was clear in that regard.
9 A. Yeah. Thank you for clarifying.
10 There's no underhanded -- and I think that -- yeah.
11 That's right.
12 Q. Okay. So you meet with Dr. Lavery and
13 you have a discussion with him up here in Jackson,
14 Michigan at the Country Club of Jackson, and you hit
15 it off, right?
16 A. Yes.
17 Q. And you had a discussion about maybe
18 what he could bring to the table by way of the patent
19 and other ideas, correct?
20 A. Correct.
21 Q. And there's been a significant number of
22 questions that have been lobbed at you relative to
23 whether or not Dr. Lavery brought anything other than
24 the patent, okay?
25 A. Correct.

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1 Q. And you've testified that he had other
2 ideas. And what I'm trying to understand here is the
3 timing of when those ideas were provided to you and
4 what ideas those encompassed.
5 And the reason that's important is
6 because the questions that you've been asked relate to
7 the consulting agreement, and the information that he
8 provided after he signed the contribution agreement.
9 But he also provided information to you
10 prior to signing the contribution agreement relative
11 to plans for the kiosk, correct?
12 A. Not much. It's pretty limited.
13 Q. Well, he --
14 A. It was --
15 Q. In his patent, he had an idea for a
16 retinal scan, right?
17 A. Yep.
18 Q. And you knew that prior to entering into
19 the contribution agreement with him --
20 A. Correct.
21 Q. -- right?
22 And that's referenced, even in the
23 contribution agreement, as potentially giving him a
24 bump up to 3 percent in the royalty in the event that
25 the retinal scan was developed, right?

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1 A. That's correct.

2 Q. And the retinal scan was never part of

3 any kiosk concept that you had with, quote/unquote,

4 you know, "your baby," as you termed it. And I -- and

5 I understand the use of the term.

6 But your baby, your version of the

7 kiosk, did not include a retinal scan, right?

8 A. That's correct.

9 Q. And the plan was at some point to

10 develop that the retinal scan, if the funding was

11 available and the timing worked out, to be able to do

12 more than what was originally consummated -- or

13 contemplated, with the idea that you had relative to

14 the kiosk and the visual acuity screening aspects of

15 it, correct?

16 A. There was potential to do that. That

17 was never my passion.

18 Q. That was his?

19 A. Correct.

20 Q. He was hoping to use a retinal scan

21 feature to scan the same patients that you were hoping

22 to scan for purposes of determining whether or not

23 they had glaucoma --

24 A. That's right.

25 Q. -- for example --

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1 A. That's right.

2 Q. -- right?

3 A. Yes.

4 Q. And that's not in any of the documents

5 that you have in your patents or your application for

6 patents? That's not anything that you were bringing

7 to the table? That was his -- that was his

8 contribution, right?

9 A. Correct.

10 Q. And he told you that before you signed

11 any agreements with him relative to the contribution

12 agreements or the consulting agreement, right?

13 A. Correct.

14 Q. The discussions that you had with

15 Dr. Lavery after you entered into the letter of

16 intent, those were all subject to the confidentiality,

17 publicity, and nondisclosure provision in paragraph 10

18 of Exhibit 22, right?

19 MR. BUSH: Object to form.

20 A. What paragraph? Sorry.

21 Q. (By Mr. Inosencio) Paragraph 10.

22 A. "Confidentiality, publicity, and

23 nondisclosure." Correct. Yes.

24 Q. Okay. And so the whole idea of this

25 letter of intent -- well, not the whole idea. But

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1 part of the idea of this letter of intent is that the

2 two of you wanted to share information and determine

3 whether or not you can go forward as a team with you

4 holding 90 percent of the company and him holding

5 10 percent of the company in exchange for him

6 providing you with information in addition to what's

7 contained in the patent, right?

8 A. Correct.

9 Q. And those are his trade secrets and

10 confidential information, and you treated it as such,

11 right?

12 MR. BUSH: Object to form.

13 A. I don't know what that means.

14 Q. (By Mr. Inosencio) Well, you weren't

15 taking his information and sharing it with other

16 people that might potentially compete with --

17 A. No.

18 Q. -- SoloHealth, right?

19 A. No.

20 Q. That would certainly be detrimental to

21 the business, right?

22 A. Yeah. Correct.

23 Q. So anyone that you talked to about these

24 ideas that Dr. Lavery had would have been only in your

25 circle of trust, also subject to some other type of

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1 confidentiality restriction, right?

2 A. Most likely, yes.

3 Q. When you first met with Dr. Lavery, do

4 you recall whether you told him that you had a

5 patent -- or that you had applied for a patent?

6 A. I do.

7 Q. What did you -- what's your

8 recollection?

9 A. That we applied for a patent. I shared

10 with him the business plan that I had, and he got

11 excited. He realized that I took it way farther than

12 I think than he ever contemplated, and he was excited

13 to be part of it.

14 Q. In a nutshell, what was your business

15 plan relative to generating revenue with the visual

16 acuity kiosk when you first met with Dr. Lavery?

17 A. Initially, it was to obtain referrals --

18 referral fees from doctors and get large retailers,

19 including Walmart and Luxottica, to pay for us to

20 generate referrals or leads to them.

21 Q. Did he have a similar business model

22 that he discussed with you --

23 A. No.

24 Q. -- at the time you were having these

25 initial discussions?

Page 142	<p>1 A. No.</p> <p>2 Q. He had a business model -- right? --</p> <p>3 relative to generating revenue from the kiosk?</p> <p>4 A. What was it?</p> <p>5 Q. Well, I'm asking you if you recall --</p> <p>6 A. No.</p> <p>7 Q. -- discussions with him relative to what</p> <p>8 he intended to do with the retinal scan aspect of the</p> <p>9 kiosk?</p> <p>10 A. I think he contemplated charging to get</p> <p>11 your, you know, retinal scan, but that was never in my</p> <p>12 plans or business model. So if he did project that,</p> <p>13 it was more future state, and he realized that it</p> <p>14 would take significant funding and more time to</p> <p>15 develop what he wanted to.</p> <p>16 Q. You said earlier, quote, "I had the</p> <p>17 impression that because it had been sitting there and</p> <p>18 no work had been done," and then you went on from</p> <p>19 there, and you were referring to Dr. Lavery's patent.</p> <p>20 What did you mean by that?</p> <p>21 A. I meant that -- what was the year that</p> <p>22 he had his patent filed?</p> <p>23 Q. Oh, hold on. I'm looking at all of</p> <p>24 yours right now. I'd have to look back.</p> <p>25 A. Hold on.</p>
Page 143	<p>1 Q. I don't have that one in front of me.</p> <p>2 I've got all yours in front of me.</p> <p>3 MR. BUSH: We haven't made that an</p> <p>4 exhibit.</p> <p>5 MR. INOSENIO: Yeah. I don't want to</p> <p>6 misstate it.</p> <p>7 THE DEPONENT: Lavery's patent is not in</p> <p>8 the exhibits?</p> <p>9 MR. BUSH: No. I have it, but it's not</p> <p>10 an exhibit.</p> <p>11 THE DEPONENT: That's all right.</p> <p>12 A. I want to say it was eight years or so</p> <p>13 prior. So my comment was the first question I asked</p> <p>14 him on the phone, when we talked before I went to</p> <p>15 Jackson was: Have you done anything with this patent?</p> <p>16 And he said, Well, I've been working</p> <p>17 with a group out of -- I think it was Australia, but</p> <p>18 they haven't really gotten any farther.</p> <p>19 And I asked him some follow-up</p> <p>20 questions, and to me at least it was clear, that very</p> <p>21 little, if anything, had been done since the patent</p> <p>22 was filed. So my comment was literally nothing had</p> <p>23 been done relative to commercializing or expanding on</p> <p>24 that idea further.</p> <p>25 Q. (By Mr. Inosencio) When you received a</p>
Page 144	<p>1 call from Novartis' lawyers in Switzerland, relative</p> <p>2 to the potential patent infringement, what was the</p> <p>3 discussion there?</p> <p>4 A. "We understand that you are the inventor</p> <p>5 of the EyeSite patent. In doing our diligence, we</p> <p>6 found that there's a patent from an ophthalmologist</p> <p>7 named Kevin Lavery in Jackson, Michigan. The patent</p> <p>8 is not exactly what you intend to do. However, it's</p> <p>9 written so broadly that we potentially could be</p> <p>10 infringing on that patent. Were you aware?"</p> <p>11 And that was the extent of that</p> <p>12 conversation.</p> <p>13 Q. And so that concerned you enough to</p> <p>14 maybe reach out to Dr. Lavery?</p> <p>15 A. Two days later.</p> <p>16 Q. Did you explain to him, when you first</p> <p>17 spoke with him or at any time, that the reason you</p> <p>18 became aware of him was that phone call with Novartis</p> <p>19 which was alerting you to a potential patent</p> <p>20 infringement?</p> <p>21 A. I did not.</p> <p>22 Q. Is there a reason that you did not?</p> <p>23 A. I didn't think it was necessary.</p> <p>24 Q. Dr. Lavery had discussions with you</p> <p>25 along the way, prior to entering into the contribution</p>
Page 145	<p>1 agreement that related to the capabilities of the</p> <p>2 kiosk that were beyond what you initially</p> <p>3 contemplated, correct?</p> <p>4 A. Correct.</p> <p>5 Q. He had ideas different from yours,</p> <p>6 right?</p> <p>7 A. Correct.</p> <p>8 Q. One of the ideas that Dr. Lavery had</p> <p>9 related to the internet connectivity aspect of the</p> <p>10 kiosk, right?</p> <p>11 A. Correct.</p> <p>12 Q. The kiosk that you developed, either on</p> <p>13 your own or in connection with these other vendors and</p> <p>14 with CIBA Vision, was more of a stand-alone that was</p> <p>15 not going to generate reports that would send data to</p> <p>16 SoloHealth, then potentially to be distributed on from</p> <p>17 there to medical providers; is that accurate?</p> <p>18 A. That's not correct.</p> <p>19 Q. Okay. Can you explain why it's not</p> <p>20 correct?</p> <p>21 A. Yeah. We had a software provider early</p> <p>22 on called Netkey that was introduced to us from Kiosk</p> <p>23 Information Systems, and their software enabled us to</p> <p>24 remotely connect into the kiosk.</p> <p>25 And it did two functions. One, it</p>

<p style="text-align: right;">Page 146</p> <p>1 provided realtime reports on if the kiosk was running</p> <p>2 or not, and we also could update the software</p> <p>3 remotely. And it enabled us to create a database</p> <p>4 where we could collect patient identifiable</p> <p>5 information and then transfer information to a doctor</p> <p>6 for referrals.</p> <p>7 Q. But the information that was being</p> <p>8 gathered under that premise did not include anything</p> <p>9 for scanning for glaucoma, diabetes, anything of that</p> <p>10 nature like Dr. Lavery was suggesting; is that</p> <p>11 correct?</p> <p>12 A. Correct.</p> <p>13 Q. So that aspect of what he was offering</p> <p>14 was different from the concept that you had relative</p> <p>15 to the visual acuity?</p> <p>16 A. That's correct.</p> <p>17 MR. INOENCIO: Okay. So what I'd like</p> <p>18 to do, Joel, is share my screen and discuss a couple</p> <p>19 different documents and make them exhibits that I can</p> <p>20 forward to you via email.</p> <p>21 Are you opposed to that at all?</p> <p>22 MR. BUSH: Yeah. Let me see if I can</p> <p>23 get into the Zoom so that I can see them.</p> <p>24 THE DEPONENT: Are we still okay on the</p> <p>25 video? I'm pulling the screen closer.</p>	<p style="text-align: right;">Page 148</p> <p>1 based on our discussion. Hopefully, we are almost</p> <p>2 there.</p> <p>3 "Notice that I left the second part of</p> <p>4 Clause 5 'as is.' After further reflection, I want to</p> <p>5 keep things simple. Bottom line is that if we are not</p> <p>6 going to use your IP, then you should not be prevented</p> <p>7 from taking it elsewhere.</p> <p>8 "Please call me if you want to discuss</p> <p>9 further.</p> <p>10 "Regards, Bart."</p> <p>11 MR. INOENCIO: Joel, I've marked that</p> <p>12 as Exhibit 41, so I'll be certain to email you a copy</p> <p>13 of that when we wrap up today, okay?</p> <p>14 MR. BUSH: Great.</p> <p>15 (Exhibit Number 41 was marked.)</p> <p>16 Q. (By Mr. Inosencio) So my question to</p> <p>17 you relative to Exhibit 41, Mr. Foster, is there were</p> <p>18 discussions between the two of you that led to</p> <p>19 modifications to the letter of intent, correct?</p> <p>20 A. Yes.</p> <p>21 Q. In other words, you didn't just sign the</p> <p>22 first version. You were having discussions back and</p> <p>23 forth about what the letter of intent should or should</p> <p>24 not include --</p> <p>25 A. That's --</p>
<p style="text-align: right;">Page 147</p> <p>1 THE VIDEOGRAPHER: It's in the shot, but</p> <p>2 it's fine.</p> <p>3 THE DEPONENT: It's good? Okay. Go</p> <p>4 ahead Joel -- sorry -- Bruce, whenever you're ready.</p> <p>5 MR. INOENCIO: Oh, the host has</p> <p>6 disabled participant screen sharing, so I'll need the</p> <p>7 host to enable that.</p> <p>8 THE DEPONENT: I'm working on that.</p> <p>9 MR. INOENCIO: Okay.</p> <p>10 THE STENOGRAPHER: Can we go off the</p> <p>11 record?</p> <p>12 MR. BUSH: Yeah.</p> <p>13 MR. INOENCIO: Let's go off record,</p> <p>14 sure. Let's take -- yeah, let's take the time to do</p> <p>15 that off record.</p> <p>16 THE VIDEOGRAPHER: We are going off the</p> <p>17 video record at 3:48 p.m.</p> <p>18 (Recess from 3:48 p.m. to 3:50 p.m.)</p> <p>19 THE VIDEOGRAPHER: We are back on the</p> <p>20 record at 3:50 p.m.</p> <p>21 A. So I'm looking at a document shared on</p> <p>22 my screen dated July 6, 2007, at 3:39 p.m. from</p> <p>23 myself, Bart Foster, to presumably Kevin Lavery, yes.</p> <p>24 "Hi, Kevin. It was good to catch up</p> <p>25 with you this afternoon. Attached is a revised LOI</p>	<p style="text-align: right;">Page 149</p> <p>1 Q. -- right?</p> <p>2 A. -- correct.</p> <p>3 Q. And eventually you settled on a letter</p> <p>4 of intent that reflected the requirement of</p> <p>5 confidentiality and nondisclosure, right?</p> <p>6 A. Correct.</p> <p>7 Q. And there's a reference in this</p> <p>8 document, Exhibit 41, to Kevin Lavery's IP, right?</p> <p>9 A. Yes.</p> <p>10 Q. And from an intellectual property</p> <p>11 standpoint, you understood that there was more to what</p> <p>12 Kevin Lavery was bringing to the table than just his</p> <p>13 patent, right?</p> <p>14 A. I'm not sure what you're referring to.</p> <p>15 Q. Well, he's sharing ideas with you</p> <p>16 relative to how he sees the kiosk rolling out,</p> <p>17 regardless of whether those ideas were implemented or</p> <p>18 approved at some point or funded at some point.</p> <p>19 A. Sure.</p> <p>20 Q. He was bringing other ideas to you,</p> <p>21 right?</p> <p>22 A. He had tons of ideas.</p> <p>23 Q. Let's go to 42.</p> <p>24 (Exhibit Number 42 was marked.)</p> <p>25 A. Okay.</p>

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<p>1 Q. (By Mr. Inosencio) So let me read this</p> <p>2 to you. Let me read this in the record.</p> <p>3 A. Great.</p> <p>4 Q. So -- and I want to make sure you can</p> <p>5 see it, and if not, I can expand it.</p> <p>6 But this is an email from you to</p> <p>7 Dr. Lavery and his attorney, Tom Spillane, and copied</p> <p>8 on it is Jeffrey Leavitt and Brian Gordon. And they</p> <p>9 were your attorneys at DLA Piper; is that fair?</p> <p>10 A. That's correct.</p> <p>11 Q. And this is an email from you with a</p> <p>12 subject line of "Revised Contribution Agreement,"</p> <p>13 right?</p> <p>14 A. Correct.</p> <p>15 Q. Dated Sunday, August 19, 2007, at</p> <p>16 5:00 p.m., right?</p> <p>17 A. Yes.</p> <p>18 Q. And in here you are saying to Tom and</p> <p>19 Kevin "please find attached a revised contribution</p> <p>20 agreement," right?</p> <p>21 A. Yes.</p> <p>22 Q. Okay. And attached to that email is an</p> <p>23 agreement, contribution agreement.</p> <p>24 Do you see that here?</p> <p>25 A. Yes.</p>	<p>1 Mr. Brian Gordon, was your attorney through this</p> <p>2 transaction, right?</p> <p>3 A. DLA Piper was our attorney.</p> <p>4 Q. And Mr. Gordon was your primary contact?</p> <p>5 A. Either him or Jeff Leavitt.</p> <p>6 Q. And they were working at your direction,</p> <p>7 right?</p> <p>8 A. That's correct.</p> <p>9 Q. So this -- part of this, there's a</p> <p>10 document up here that was forwarded on to -- it's</p> <p>11 another email account. But this says Brian Gordon</p> <p>12 sent this email on October 6, 2007, at 2:41 p.m.</p> <p>13 Do you see that?</p> <p>14 A. I do, yes.</p> <p>15 Q. And it was sent to Mr. Lavery -- or,</p> <p>16 excuse me, Dr. Lavery, Tom Spillane, and to</p> <p>17 Dr. Lavery, and you were copied on it and so was Jeff</p> <p>18 Leavitt, the other attorney at DLA Piper that was</p> <p>19 working with you, correct?</p> <p>20 A. Correct.</p> <p>21 Q. And this is Saturday, October 6, 2007,</p> <p>22 and the email states: "Please find attached revised</p> <p>23 agreements reflecting all comments to date which</p> <p>24 should be final."</p> <p>25 Do you see that?</p>
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<p>1 Q. In the upper right corner, there's a</p> <p>2 reference to DLA Piper Draft August 15, 2007.</p> <p>3 Do you see that?</p> <p>4 A. I do, yes.</p> <p>5 Q. And in the bottom left corner of that</p> <p>6 document, there's a reference to the file name BALT,</p> <p>7 as in Baltimore, 1\4362547.2.</p> <p>8 Do you see that?</p> <p>9 A. Yes, I do.</p> <p>10 Q. Do you see also up here at the very top</p> <p>11 of Exhibit 42, the document that's referenced as being</p> <p>12 attached is number 4362547v2?</p> <p>13 A. Yes.</p> <p>14 Q. Which would suggest to you that this is</p> <p>15 the email and attachment that go together, correct?</p> <p>16 A. I don't know.</p> <p>17 MR. INOSENICIO: By the way, Joel, that</p> <p>18 is Exhibit 42. I'll send that to you via email as</p> <p>19 well.</p> <p>20 MR. BUSH: Thank you.</p> <p>21 MR. INOSENICIO: It's 12 -- yeah, 12</p> <p>22 pages long there.</p> <p>23 Let's go to Number 43.</p> <p>24 (Exhibit Number 43 was marked.)</p> <p>25 Q. (By Mr. Inosencio) Mr. Gordon,</p>	<p>1 A. Yes.</p> <p>2 Q. Were you aware of any further changes</p> <p>3 that needed to be made between Saturday, October 6 and</p> <p>4 the following week when the documents were signed?</p> <p>5 A. I don't know.</p> <p>6 Q. If you go to the consulting agreement,</p> <p>7 Exhibit 29 --</p> <p>8 A. Exhibit 29. Got it.</p> <p>9 Q. -- you signed that document, right?</p> <p>10 A. Just a second.</p> <p>11 Correct. Yes.</p> <p>12 Q. And what's the date of your signature?</p> <p>13 A. I don't see a date.</p> <p>14 Q. Okay. What's the date -- is</p> <p>15 Dr. Lavery's signature on the version of the document</p> <p>16 you're looking at in Exhibit 29?</p> <p>17 A. Yes. October --</p> <p>18 Q. Is Dr. --</p> <p>19 A. -- 11, 2007.</p> <p>20 Q. October 11, which was a Thursday, so</p> <p>21 five days later.</p> <p>22 So what I'm wondering here is if this</p> <p>23 email in Exhibit 43 is sent in an attached and revised</p> <p>24 agreement that are reflecting all comments to date</p> <p>25 which should be final, would you expect your attorney</p>

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<p>1 to alert you to additional revisions before anyone 2 signed the document? 3 A. Of course. 4 Q. Okay. In this document, there's a 5 reference to the contribution agreement. 6 Can you see that right here? I'm 7 putting my cursor under . . . 8 A. Yes. 9 Q. And it's Number 4362547, version 7. 10 A. Okay. 11 Q. Is there a reference to the document 12 that you have in front of you as Exhibit 29 in the 13 bottom left corner of the consulting agreement? 14 A. There is. 15 Q. And can you read that number into the 16 record? 17 A. It's BALT -- 18 Q. 1? 19 A. -- 1\4389946.3. 20 Q. Okay. And you're looking at the 21 contribution agreement or consulting agreement? 22 A. Consulting agreement. 23 Q. Okay. 24 A. Exhibit 29. 25 Q. Okay. Now let's look at the</p>	<p>1 contribution agreement. I'll scroll through here 2 quickly just so you can see. We'll get to the 3 signature page here. 4 Okay. This is the version bottom left 5 corner BALT1/4362547.7? 6 A. Yeah. 7 Q. Do you see that? 8 A. I do. 9 Q. Bottom left corner here? 10 A. Yes, I do. 11 Q. Okay. Thank you. 12 I would like to direct your attention to 13 page 2 of the contribution agreement, which I have on 14 the screen here. 15 A. Okay. 16 Q. In Section 1.2 there's a discussion 17 regarding the royalty associated with the intellectual 18 property. 19 Do you see that? 20 A. I do. 21 Q. And in this document in Section 1.2 (a), 22 do you see that it states, quote, "As additional 23 consideration for the contribution, subject to 24 Section 1.2 (b), the company hereby agrees to pay 25 Lavery, or his assignee, a perpetual royalty (the</p>
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<p>1 contribution agreement, Exhibit 26. 2 A. Okay. 3 Q. If the contribution agreement was part 4 of this email as well, which suggests that these are 5 the revised agreements reflecting all comments to date 6 which should be final, if there were changes made 7 between the time that this was sent on October 6 until 8 the time that the closing was held, October 11, five 9 days later in Atlanta, would you expect your attorney 10 to alert you to those revisions as well? 11 A. Yes. 12 Q. The document that you're looking at 13 right now, what's the title of that document? 14 A. Contribution agreement. 15 Q. That's Exhibit 26, right? 16 A. Correct. 17 Q. And does it have a document number in 18 the bottom-left corner? 19 A. It does. 20 Q. And can you read that into the report? 21 A. Balt1, backslash, 4362547.8. 22 Q. Thank you. 23 Showing you know Exhibit 44. 24 (Exhibit Number 44 was marked.) 25 Q. (By Mr. Inosencio) This is the</p>	<p>1 'royalty') on a quarterly basis of 1 percent (the 2 'royalty percentage') of the company's net domestic 3 sales of products for the prior quarter; provided that 4 at the time that the company first receives net 5 domestic sales from retinal camera products, the 6 royalty percentage shall be increased to 3 percent; 7 and provided further that no royalties shall be 8 payable pursuant to Section 1.2 or Section 1.3 prior 9 to the first anniversary of the launch date (and no 10 royalty shall accrue for any net domestic sales of 11 products made prior to the first anniversary of the 12 launch date)." 13 Did I read that into the record properly 14 relative to what's on the screen here in Exhibit 44? 15 A. Yes. 16 Q. There was a discussion, wasn't there, 17 before this document was signed relative to the 18 1 percent royalty and the 3 percent royalty, correct? 19 A. Correct. 20 Q. And the 3 percent royalty was tied 21 specifically to whether or not the retinal camera 22 scan -- excuse me -- the retinal camera products would 23 become part of the kiosks, right? 24 A. Correct. 25 Q. The reason I showed you the earlier</p>

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<p>1 email is because you referenced that in the event 2 Dr. Lavery's IP wasn't used that he should be able to 3 take it back. Is that part of what was happening here 4 with this 3 percent, the retinal scan, and that 5 percentage? 6 A. I don't know. 7 Q. Okay. With respect to the 1 percent 8 royalty, the word "perpetual" is included in this 9 version of the agreement on the screen. 10 Do you see that? 11 A. Yes. 12 Q. Right here? 13 A. Yes. 14 Q. Is the word "perpetual" included in the 15 version that you have in front of you? 16 A. Exhibit 26? 17 Q. Yes. 18 A. Yes. 19 Q. What does the word "perpetual" mean to 20 you? 21 A. Ongoing. 22 Q. Okay. And that's what you thought it 23 meant when Mr. Gordon inserted the word "perpetual" 24 into the agreement after Kevin Lavery wanted a forever 25 royalty, right?</p>	<p>1 MR. BUSH: -- transcript, so -- 2 MR. INOENCIO: Yeah. 3 MR. BUSH: -- I'll make sure she gets 4 them if you send them to me. 5 But if you've got her contact 6 information, that will save me the hassle since I'm 7 traveling. 8 MR. INOENCIO: Let's go ahead and end 9 the record. 10 THE VIDEOGRAPHER: We are off the record 11 at 4:06 p.m., and this concludes today's testimony 12 given by Bart Foster. 13 (Discussion held off the record.) 14 THE STENOGRAPHER: Mr. Bush, you have a 15 standing order that you've submitted to Veritext, 16 correct, and you'd like a rough draft? 17 MR. BUSH: I'd like a rough. I need to 18 confirm with my paralegal about our standing order. 19 (Discussion held off the record.) 20 THE STENOGRAPHER: Would you like to 21 order the transcript? 22 MR. INOENCIO: Oh, yes, please. 23 THE STENOGRAPHER: And would you like a 24 rough draft as well? 25 MR. INOENCIO: Yes, please.</p>
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<p>1 A. Correct. 2 MR. INOENCIO: I have no further 3 questions. 4 MR. BUSH: Just a quick follow-up on my 5 part. 6 FURTHER EXAMINATION 7 BY MR. BUSH: 8 Q. Mr. Inosencio asked you some questions, 9 Mr. Foster, about ideas that Lavery had before 10 execution of the contribution agreement. 11 Do you remember those questions? 12 A. Yes. 13 Q. Are you able to identify today -- 14 specifically identify any ideas that Dr. Lavery 15 provided to you before the execution of the 16 contribution agreement? 17 A. No. 18 MR. BUSH: No further questions. 19 MR. INOENCIO: I have no further 20 questions. I will send Exhibits 41 through 44 21 directly to you, Joel. Do you want the court reporter 22 to have copies also? 23 MR. BUSH: Yeah. That would really be 24 best because we'll want to make them a part of this -- 25 MR. INOENCIO: Right.</p>	<p>1 (Signature not requested.) 2 * * * * * 3 WHEREUPON, the foregoing deposition was 4 concluded at the hour of 4:08 p.m. on 5 January 13, 2023. 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>

REPORTER'S CERTIFICATE

I, Jennifer Bajwa Melius, a Verbatim
Stenographic Reporter and Registered Professional
Reporter, do hereby certify that previous to the
commencement of the examination, the witness was duly
sworn by me to testify the truth in relation to
matters in controversy between the said parties; that
the said deposition was taken in stenotype by me at
the time and place aforesaid and was thereafter
reduced to typewritten form by me; and that the
foregoing is a true and correct transcript of my
stenotype notes thereof.

That I am not an attorney nor counsel
nor in any way connected with any attorney or counsel
for any of the parties to said action nor otherwise
interested in the outcome of this action.

IN WITNESS WHEREOF, I have hereunto set
my hand on this day, January 27, 2023.



Jennifer Bajwa Melius
Registered Professional Reporter

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FLORIDA RULES OF CIVIL PROCEDURE

Rule 1.310

(e) Witness Review. If the testimony is transcribed, the transcript shall be furnished to the witness for examination and shall be read to or by the witness unless the examination and reading are waived by the witness and by the parties. Any changes in form or substance that the witness wants to make shall be listed in writing by the officer with a statement of the reasons given by the witness for making the changes. The changes shall be attached to the transcript. It shall then be signed by the witness unless the parties waived the signing or the witness is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within a reasonable time after it is furnished to the witness, the officer shall sign the transcript and state on the transcript the waiver, illness, absence of the witness, or refusal to sign with any reasons given therefor. The deposition may then be used as fully as though signed unless the court holds that the reasons given for the refusal to sign require rejection of

the deposition wholly or partly, on motion under
rule 1.330(d)(4).

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ARE PROVIDED FOR INFORMATIONAL PURPOSES ONLY.
THE ABOVE RULES ARE CURRENT AS OF APRIL 1,
2019. PLEASE REFER TO THE APPLICABLE STATE RULES
OF CIVIL PROCEDURE FOR UP-TO-DATE INFORMATION.

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